THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. | ST. LOUIS, FRIDAY, JANUARY 7, 1876. | Hon. JOHN F. DILLON Contributing Editor.

With this number, the undersigned assume control of the business department of the JOURNAL. The editorial charge will remain with the gentlemen who have so ably and successfully conducted it heretofore. The editors contemplate no change in the plan of the JOURNAL, and will make only such as experience shall show is for the advantage of our readers. The aim of the editors and publishers is to make the CENTRAL LAW JOURNAL more than ever before—to use the words of Chief Justice Waite—"in fact what it purports to be, A LEGAL NEWSPAPER."

As a "send-off," under the new management, we present the JOURNAL in an entire new dress, bought expressly for this purpose. We are enabled by it to set about one-fourth more matter than heretofore, a change demanded by the increasing pressure on our columns.

It is proper to add that it can scarcely be said the JOURNAL has passed into "new hands." We have been connected with it from its inception, and during the past year have been large owners in it. We have now simply bought a controlling interest in it, and take charge of its publication. Messrs. Soule, Thomas & Wentworth still have an interest, withdrawing from the control to enable them to devote closer attention to their large and rapidly increasing business as dealers and publishers of law books. Their interest in the continued success of this paper and of the SOUTHERN LAW REVIEW (which we shall hereafter also publish) is as keen as ever, and they will continue to advance the interests of these publications hereafter as heretofore.

All business communications should be addressed to the publishers, G. I. JONES & Co., 208 S. Fourth St., St. Louis.

RIGHT OF ACTION FOR DAMAGES RESULTING IN DEATH.—We sincerely regret the conclusion of the Court of Appeals of Kentucky in the case of Parrish v. Davidson's Admr., which we print elsewhere. The result reached appears to us to be a plain and unmistakable misconstruction of the statute under consideration; and we seriously think that the learned and courteous correspondent who sent us the opinion has, in his note to the case, consumed unnecessary time in proving what is obvious beyond the necessity of argument. For the opinion and note we are indebted to L. McQuown, Esq., of Glasgow, Ky.

Bankruptcy and the Statute of Limitations.

An article which appeared in the JOURNAL of November 26th, (vol. 2, p. 762), signed by one favorably known to the profession as author of several legal treatises, is likely, if suffered to pass without comment, to give an erroneous impression of the decisions in bankruptcy upon the admission to proof of claims barred by the statute of limitations. A reference to the reported decisions on the point in question, instead of showing that they afford an "example of the extreme uncertainty, not to say lamentable confusion, which attends the construction of the bankrupt law," will show that the law is well settled and uniform in all the districts in which the point has been decided.

It is true, that of the five cases cited in that article, three exclude from proof claims barred by the statute, and two allow such claims to be proved; but the writer omits to cite the decision of Judge Woodruff in *Re* Cornwall, 9 Blatchford, 114, 6 N. B. R. 305, which rejects similar claims and overrules the two decisions which admit them.

The first decision, rejecting the claims was in the district of Massachusetts, in February 1868. *In re* D. P. Kingsly, 1 Lowell 216; 1 N. B. R. 329.

In that case the grounds for the application of the statute of limitations to proceedings in bankruptcy are very fully set forth, and precedents, which were then to be found only in English cases, were considered, as far as applicable in our practice. The rule here adopted was concurred in a few weeks later in the District of Maine. *In re* H. P. Harden, 1 N. B. R. 395. The decision in *Re* Cornwall, above referred to, following the decision in Massachusetts, and overruling the two adverse decisions, was rendered in 1871. To these is to be added the case of Naesen, reported in this JOURNAL, vol. 2, p. 570. So that claims barred by the statute of limitations have been excluded from proof in bankruptcy proceedings in Massachusetts and Maine, nearly eight years, in the second circuit nearly five years, and recently in the Eastern district of Wisconsin. If there have been decisions upon this point in other districts, they are not reported. Where then is the "uncertainty" or "lamentable confusion" of construction of the law upon this point?

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John Wells.

The late John Wells, whose death has recently been much noticed by the bench and bar of Massachusetts, was altogether a remarkable man. On the fifteenth of August, 1866, James D. Colt, one of the justices of the Supreme Judicial Court of Massachusetts, resigned; and a few days afterwards Dwight Foster was appointed in his stead. In the same month of August, Charles A. Dewey, the senior associate justice, died; and on the twenty-second of September next following, John Wells, then residing in Chicopee in the county of Hampden, but little known beyond his immediate neighborhood, but already well known, and altogether favorably known there, was appointed to fill the vacancy. He first took his seat on the bench, on the first day of the October term, 1866, at Boston. The first case heard was a bill in equity to restrain the defendants from flowing the plaintiff's land. It was the case of Knapp against the Douglas Axe Company, and will be found reported in the 13th of Allen. The opinion was written by Judge Wells. The impression that he made at first was favorable, and he went on constantly increasing in favor, most with those who saw him most and had most to do with him—to the end. His last day in court was his best and brightest. "I am glad," said he to the writer of this notice, "the report is satisfactory to you. Show it to Mr. Putnam. If he is satisfied with it, file it, if not satisfactory, tell him to communicate with me at Salem. I shall be here again next week." And so he goes to Salem; and there like a brave soldier found faithful at his post, with his carbine clasped in his cold hands, he stands until relieved—and then takes farewell. His death was classic as his whole life had been. He loved his profession and found his highest comfort in the performance of his duty. Of his greatness it does not become me to speak, since, I suppose, he who sits in judgment upon the question of greatness, to give or withhold certificates as seems to him meet, must himself be great. But I may perhaps presume to say, he seemed to me to be both a great and a good man, —always big enough for his place—made larger than most who occupy such—and not too big, as they sometimes say of one, for his clothes. At Naples, one pays a franc and is admitted to the museum. There you are shown the fresco

paintings and mosaics, the gold and silver ornaments, Etruscan vases and stained glass, the terra cotta and the papyrus which cadaverous looking Jews are unrolling and transcribing, and your guide, for six francs a day, will tell you all about the mediæval antiquities and the ancient bronze statues, stopping before one of which you are told, "this is Seneca,"—one of the most remarkable in the whole collection—a great bushy head, and altogether fine of the kind. You look at Seneca for a moment and say, "why this is Judge Shaw!" One looked at Judge Wells and said, "How like Spinoza," only whiter and of ruddier complexion. Like Spinoza, Judge Wells was of middling height and slender frame. His forehead was broad and high, his eyes large and clear, his teeth white and perfect, and all his features regular. He wore his hair brushed away to one side; he was clean shaven; his dress was plain and always neat. And like Spinoza he seemed to say, "As for myself, I give offence to no one, or strive to give none; to do otherwise were in opposition to my proper nature." He charmed all the senses. He was white and clean. His voice was pleasent. His presence was fragrant. One seemed to taste the delicacies he offered. Touch proved him to be current gold indeed. He invited discussion, rightly, as it seems to me, deeming that thereby only can the bar ever become great or the opinions of the court be likely to be of any great value beyond the determination of the case decided. He was an attentive listener, always giving the speaker his own attention and never rudely distracting the attention of others. If, during an argument, a slip of paper whereon was written some frivolous remark, was passed to him by an associate, he threw it under his feet and never passed it to the next. He was not troubled about his dignity, and never lost it in attempting to teach it to others. He was constant. In a forest, some of whose trees are scrubby, stunted and leafless, and others tall, like poplars, with luminous foliage, and otherwise well enough in fair weather, but soft of texture and likely to be broken by the bleak winds, the traveller, seeing the storm coming and needing protection, seeks the oak, because he knows its roots run deep into the earth and its trunks and branches are strong. Judge Wells was quick to discriminate. As the refiner, seeing the dust fall, knows at once what is gold, and what, though it also glistens, is not gold,—and as the skilled farmer knows directly the good grain from the bad, so this Judge knew the truth at first sight, and where to look for it. When one of his associates was taken sick with the small pox, and rather than be an offense to his family or freinds, chose to go to a public hospital to be cared for, Judge Wells, upon learning where this associate had gone, went straightway to the offensive place and demaned to see him. Admission was of course refused. Determined not to be thus defeated in his purpose, he thereupon wrote a note in pencil to his associate whilst sitting in his carriage, saying:—"Tell these fellows to let me in. Sick or well, I must see you." And he was admitted, saw his associate, and as I believe generally happens when a brave and generous act is done, no harm to anybody came of the interview. All honor to the memory of this kindly, considerate and gifted man. They called him Unitarian. Of his religious belief, he never, that I remember, spoke in my presence, and I know nothing of it. But I feel assured, if there is another world, he must fare well there. And if there is no other, he has shown us how important and how beautiful it is to live like gods in this. PELHAM.

The Chicago Inter-Ocean and the Whiskey Ring.

The most shameless piece of business of which any respectable newspaper has been guilty within our knowledge is the attempt of the Chicago *Inter-Ocean* to turn popular sentiment against Secretary Bristow, and break down his efforts to bring to justice the members of the whiskey ring. To those who have not read the four columns of stuff which that journal published on the 26th of last month, we can not attempt to convey the faintest impression of it. For a mixture of silly twaddle and brazen-faced lying, apparently inspired by some one outside the editorial department of that journal itself, and for wicked and corrupt purposes, we have not seen its equa.

The drift of the stuff is that Babcock is going before a Congressional Committee, there to tell all he knows; that what he will tell will involve Secretary Bristow in complicity with the whiskey ring and check the efforts which he is putting forth against other members of the ring, and by which he hopes to gain the Presidency. The silly statement is also made that by thus testifying he will oust the jurisdiction of the United States Court at St. Louis to try him under the indictment now pending against him; and that this result will be reached by virtue of the following statute (R. S. § 859): "No testimony given by a witness before either house, or before any committee of either house of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within said privilege." The *Inter-Ocean* also makes the silly and lying assertion that the sentence of McDonald "has been reserved to enable him to testify before that committee"—as though a committee of Congress may not call before it any person it chooses, felon under sentence or otherwise, and believe his testimony too—and as though the fact of his being sentenced or otherwise could have any influence on his credibility. The truth is, that Mr. District Judge Treat deferred the sentence of McDonald and others, in order that, after the other members of the ring under indictment had been tried, he might, with a full knowledge of the facts, properly admeasure their respective sentences.

The shameless character of the article in the *Inter-Ocean* can scarcely be understood unless attention is directed to the followinging sentence: "Were he [Babcock] not to be tried *by a court completely under Bristow's influence and acting under Bristow's instructions*, he is satisfied that his explanations, which he will make before the Congressional Committee, would be sufficient to clear him." In answer to such a base calumny upon two gentlemen who, from the nature of their official positions, are precluded from noticing it themselves, we take the liberty to say that it is well known to the public, and a daily newspaper can not plead ignorance of it, that the trial of Babcock has been adjourned to the United States Circuit Court for the Eastern District of Missouri, and will take place before Hon. John F. Dillon, Circuit Judge, Hon. Samuel Treat, the District Judge (we presume) sitting with him; and that this is the first time that we have ever heard a suspicion breathed against the integrity of either of these men. Two more fearless, fair and upright judges do not sit upon the bench in this or any other country.

We might quote many other passages from this remarkable document, as for instance the following: "The secretary of the treasury at present has a connecting wire between his little bell and every penitentiary in the land. But if all stories are true, there is not a penitentiary in the land that does have a wire connected with his little bell upon the appointment of his successor."

Perhaps the most remarkable part of it all, however, is an interview which purports to have taken place between Judge Glover of Chicago, an aged and respected lawyer, formerly United States District Attorney, and an *Inter-Ocean* reporter. Mr. Glover must be a "good, easy man, full surely;" for how any other man could, in his own house, submit to such a cross-examination by an irresponsible vagabond sent from a newspaper office for that purpose, without first attempting to kick him out doors, is more than we can see. The following extract is a fair specimen of the whole—and the whole fills two columns:

"Have you ever heard that Mr. Bristow ever represented Newcomb, Buchanan & Co., of counsel?"

"No, sir, I never heard of his representing anybody."

"Did you ever hear of his representing Weller & Co., of Louisville?"

"If I ever did, I have forgotten it."

"Did you ever hear that the brother of Weller is a brother-in-law of Bristow?"

"No."

"Did you ever hear that Mr. Bristow, prior to his elevation, represented as counsel the firm of Mattox, Hobart & Co., of Cincinnati?"

"No, sir."

"Isn't it true that Mr. Hobart and Mr. Bristow are now, and have been for years, on terms of intimacy?"

"I don't know, sir."

"Isn't it true that whenever Bristow visits Cincinnati he visits at the house of Mr. Hobart?"

"I have never been in Cincinnati in my life. I know nothing about it."

"Have you ever heard of any raids or seizures in Cincinnati, under the whiskey law?"

"I don't know that I have until recently, by the papers."

"Assuming all these suppositions to be facts, does it not, in your judgment, place Mr. Bristow in the position occupied by gentlemen who have been removed for preserving far too friendly relations with whiskey men?"

"I don't know of any men who were removed for such reasons. It would not shake my confidence in Mr. Bristow. I would still have unlimited confidence in him."

"In the case of any other man, wouldn't you look on such conduct as suspicious?"

"I don't know."

"Wouldn't you think it a little injudicious?"

"I would think it highly injudicious for any man to put himself in the position you assume."

"Have you heard that $15,000 were sent by parties in Louisville to secure the conviction of whiskey-ringsters in Chicago?"

"No."

"Have you heard that any money was sent?"

"No."

"All things considered, do you not think Mr. Bristow is in rather a delicate position?"

"Well I don't know."

"Wouldn't another man be?"

"I can't answer that question, because I don't believe your hypothetical case."

"I have received it from good authority."

"I don't believe it—for a variety of reasons."

Exhibitions of such a disregard for truth and decency in journalism are calculated to produce a variety of reflections. Is a great newspaper like a theater, the more questionable the entertainment the greater the patronage? Are the principles which men in ordinary business find necessary to success, reversed and entirely inapplicable to the conducting of a public journal? In this profession alone does corruption succeed where honesty fails? Do the majority of those who buy and read the daily journals love to be misled by false news? Do they love to be insulted by dishonest and disingenuous comments upon passing events? Do they love to hear public servants whom they delight to honor, falsely accused of the most shameless and improbable practices, because such accusations may promote the interests of certain indicted thieves? Can an American journal, in this centenial year of our progress and independence, afford to ally itself with a combination of indicted felons, and, possibly to assist some of them to escape the justice of the law, defy every principle of honesty and decency, and involve in the same false and libellous accusations, an honest minister of the government and the most stainless and upright judges of the courts? If these things can be, the Chicago *Inter-Ocean* has placed itself upon the high road to prosperity; but any journal so conducted ought to go down beneath a storm of public indignation and contempt.

McRee v. Copelin et al., and Gibson v. Chouteau.

Boileau says that it is of the essence of a good book to have fault-finders. Therefore as I have seen no criticism of the case of McRee v. Copelin *et. al.*, CENTRAL LAW JOURNAL, p. 813, Vol. 2, and as no one who has the pleasure of knowing the able judge who wrote the opinion, can be more anxious than I am that it should sustain the deserved reputation of its author, I proceed to uphold it, as far as I can, by a vigorous attack.

This opinion is at once ingenious and startling. It is ingenious, because it proceeds much as one should in making a needle out of a crowbar, to remove layer after layer from the well known form of Gibson v. Chouteau; and exhibits the once formidable "rule" as the veriest "shadow of a shade." It is startling because it undertakes to show that the general understanding as to what was decided in Gibson v. Chouteau is incorrect; the learned judge even seeming to admit that the Supreme Court of the United States itself shares the general misconception of its own decision. At least he says: "Certainly the case referred to and that of Langdeau v. Hanes, 21 Wall., show a determination of the United States courts to narrow and confine the application of Gibson v. Chouteau;" thereby implying that these courts regard that case as a somewhat broad one; as they probably would not narrow it all, if they took the view entertained of it by the learned judge, who says: "thus understood there is nothing, or very little, to complain of in the decision of Gibson v. Chouteau; very little indeed to justify the alarm created." It is true that other passages in the opinion do not harmonize with my inference; but as I only endeavor to show that the learned judge and I agree as to the light in which the Supreme Court of the United States probably regard the case of Gibson v. Chouteau, it is I, and not he who will suffer if the inference is erroneous.

As the case of McRee v. Copelin *et al.* is in the hands of all who may read this, and as I have not much space at my disposal, I shall not quote from it to any considerable extent. The facility for correcting any misrepresentations I may make will render them harmless to my readers, and show, if other proof be wanting, that they are entirely unintentional.

The opinion in McRee v. Copelin *et al.* proceeds, as I understand it, upon the theory that the Supreme Court of the United States in Gibson v. Chouteau did not pass upon the statute of limitations at all, except in so far as to decide that they could not pass upon it. That the form of the patent was conclusive in the case as it came before them, and that the decision might have been, probably would have been, and certainly should have been different if the patent, instead of being directly to Mrs. McRee, had been to her and "her legal representatives;" or if Chouteau had brought a bill in equity to divest the title out of Mrs. McRee, which she had at law acquired by the patent in its actual form.

Now as this opinion derives its distinctive character from the admitted fact that the construction put by it upon Gibson v. Chouteau, a case that has attracted the serious attention of the greater part of the leading lawyers in the United States, is contrary to that generally received, it seems at least to be incumbent on the learned judge to show, not merely that the received construction would be bad law, but that it would involve the court in a departure from a well recognized form of procedure, so well recognized indeed, that almost any presumption should be resorted to, to exclude that of its violation. And I believe it is upon the existence of such a controlling form of procedure that reliance is had in McRee v. Copelin *et al.* For it is there asked: "If a deed executed by Mrs. McRee before the patent to herself, had been shown, conveying all her estate to Mr. Chouteau, how could such a deed of conveyance have affected the defence of the statute of limitations, as that stood before the Supreme Court of the United States? This question is evidently put with reference to the well known case of Bagnell v. Broderick, 13 Pet. 436. Let us then see whether this case, or any other, establishes a form of procedure that would prevent a decision upon the merits in Gibson v. Chouteau. In Bagnell v. Broderick, ejectment had been brought in a Circuit Court of the United States by the patentee, the defendant setting up fraud and claiming to be equitable owner. The Supreme Court held that the patentee must prevail, the recourse of the defendant being to the equity side of the

circuit court. Even from this holding two justices dissented on the ground that the defendant could, by his answer, modify the common law action in the United States Circuit Court to the same extent as he could in the state court. But in Susgett v. Lapice, 8 How. 48, it was held that when the action had been instituted in the state court, and taken by the defendant before he had pleaded, into the Circuit Court of the United States, and an equitable answer there put in, that being allowed by the practice of the state, the whole case became an equitable one, and an appeal, and not a writ of error was the proper way to take it up to the supreme court. And in Ross v. Doe dem. Barland et al., 1 Pet. 655, which came up on error to the Supreme Court of Mississippi, and was an action of ejectment where the defence was substantially an equitable one, the court says: "It is undoubtedly true that upon common law principles the legal title should prevail in the action of ejectment upon the same grounds that the legal title prevails in the other actions in courts of law;" then having stated these grounds, the court proceeds: "but in other states the courts of law proceed upon other principles. In the action of ejectment they look beyond the grant and examine the progress in the stages of the title from its incipient state, whether by warrant, survey, entry or certificate, until its final consumation by grant. This seems to be the one adopted and pursued in the courts of Mississippi." It was accordingly held that the supreme court would do as the Mississippi court did. This decision seems precisely in point to show the power of the court to look behind the patent, when the case comes from a court where that is done on an answer that prays for it. If, however, it be contended that it is not in point, either because it only holds that the United States Supreme Court will follow the state court, where a common law action is merely modified, but not where it is changed into an equitable one; or because there have been indications since the decision of that case, that the rule three laid down was not correct; still the fact that it enunciated a doctrine so like the one which would justify an examination of Gibson v. Chouteau on equitable principles, would sufficiently break the force of the presumption that this latter case was not decided on equitable principles, to render it entirely unequal to overcome the general sense of the profession.

But even supposing that the case of Gibson v. Chouteau was decided on equitable grounds, it having come up from a state where the equitable defence made was allowed; and that this decision was contrary to the established practice of the United States Suprene Court, yet this decision would not be an *obiter dictum*. I know that I am, like the learned judge in his opinion, though unfortunately without his reasons, heterodox upon this point. I shall therefore just state my views and pass on. If an appellant must, to be successful, maintain two propositions: first, that in the state of the record a certain inquiry can be made; second, that on its being made, a certain conclusion will be arrived at, it seems to me that if it is on investigation first apparent to the court that that conclusion could not be arrived at, on any inquiry, they can decide the case on that, without determining whether the inquiry could be made at all or not. It may be that a thorough examination of all the law bearing upon the case might, at the time, or afterwards, as more generally happens, show that had the court taken up the propositions in a different order, they would have found that they could not enter upon the inquiry at all. But all the legal propositions covering a case do not dawn simultaneously, nor in any particular order of sequence upon the judicial mind. And if a court can not decide against a party upon the most favorable view that can be taken of his case, because further examination would have shown that that view could not be taken, then a great many decisions are outside the case. But I shall keep my promise. However even admitting that the declaration in Gibson v. Chouteau that, one could gain no title whatever by adverse possession, prior to the issuance of a patent to the party entitled to it, but for such possession, is an *obiter dictum;* I still think it is practically conclusive. Undoubtedly there is a wide difference between *obiter dicta*. And although an expression of opinion by a court upon a proposition argued before it, the determination of such a proposition being, in one view, essential to the decision of the case, may be technically an *obiter dictum*, when the decision is actually based upon something else; yet, if the doctrine contained in the *obiter dictum* be important in its practical operation, as if it be a rule of property not hitherto distinctly announced, it can not but be regarded as the deliberate opinion of the court. To seek to escape from such an *obiter dictum*, if it can be properly so called, would seem like objecting to the evidence given by a witness because when being sworn he had not kissed the Bible, or raised his hand. Whether others feel themselves bound by the *dictum* or the evidence, there can be little doubt as to what the court and the witness will do, when again called upon for their views. And this was the opinion of the Supreme Court of Missouri, in reference to the quite analogous question as to when the statute of limitations began to run against a New Madrid claimant, although in that case Judge Napton, undoubtedly *agminis instar*, dissented. The court said of the case of Bagnell v. Broderick *supra*: "It is true that the cause might have been determined without an expression of opinion in relation to this question. But upon examination it will be found that the point was involved and that it was determined. As this is a question arising under the laws of the United States, and as the highest tribunal known to the federal constitution has pronounced its judgment in relation to it, that judgment is obligatory on this court whatever opinion might be attained of its correctness." Cabanne v. Lindell 12 Mo. 184.

However it must be conceded that an inferior court may be reluctant to follow an expression of opinion by a superior court, whether a decision or a *dictum*, in proportion as it considers that opinion incorrect. And this brings me to the merits of Gibson v. Chouteau.

This case is well known to all who take any interest in McRee v. Copelin, *et al.*, or in my observations upon it. It was there declared, and whether that declaration was an *obiter dictum*, is, of course, now immaterial, that no length of adverse possession before the issuance of a patent would give a title that would stand in law or equity against the patentee. The court said: "But neither in a separate suit in a federal court nor in an answer to an action of ejectment in a state court can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity to control the legal title subsequently conveyed to otners by the patent of the United States." Again: "The defendants in this case were strangers to the claim or equitable title as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder." This shows clearly the opinion of the court that the defendants could defend if they were grantees of the patentee. This declaration has been subjected to much criticism, the justice of which I am unable to see. It is true this age favors the boasted and, in the main, advantageous facility in the transfer of property; though it would be easy to point to evidences of dissatisfaction with it on the part both of legislatures and courts. And with regard to statutes of limitation themselves, though now regarded as statutes of repose, and not of presumption, courts are just rather than logical in allowing to debts barred by the statute, a mysterious moral power, which may easily clothe itself in the proper legal habiliments. Further, and coming nearer to the question, it has been held that the statute of limitations did not run against a *cestui que* trust at all. This is not now the law; and the reason given why it should not be,

is: "that if the rule which prevents the application of the statute of limitations, as between *cestui que* trust and trustee should hold between *cestui que* trust and a stranger, it would nearly annihilate the force and utility of the statute, since the practice of vesting landed property in trustees is so prevailing and general." Angell on Limitations, p. 472, 5th ed. But though the estate of a *cestui que* trust can be divested by a possession adverse to the trusee, "the rule is a settled one that so long as the trust subsists, the right of a *cestui que* trust can not be waived by his being out of possession. This can only be done by barring and excluding the estate of the trustee." Washb. Real Prop. p. 145. vol. 3, 3rd ed. Now this principle is of little efficacy when, as is generally the case, the trustee is a private person. For the possession of the disseizor is almost always adverse to him and to the world, when it is adverse to the *cestui que* trust. But when the trustee is one like the United States against whom adverse possession can not be held, what rule should be adopted? The refusal of courts to extend to the disseizor the benefit of the statute in the case when his holding has not been adverse to the private trustee as well as to the *cestui que* trust, is simply an effort, by a legal technicality, to prevent legal robbery. Why then when the trustee is not affected by the statute, should equity assist the disseizor, because he had not succeeded in stealing all he intended? It is absurd to urge, as has been urged, that the patentee frequently recovers against *bona fide* grantees of the disseizor. Some hardship would have been done, on the first settlement of the rule whichever way it had been settled. And settled as it was it must have produced very little. When it did not affect disseizors and their heirs, the *bona fide* purchasers whom it did affect had probably in many instances become such through the "noble passion of speculation." After the settlement no one could become a *bona fide* purchaser, and owners of property were left one chance more against the "land sharks."

Judge Jones, however, says that it is not the law of Missouri, that the Supreme Court of the United States announced when saying: "The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the state." But no case cited by the learned judge and no case that I have been able to find, holds this to be incorrect. Of course, several Missouri cases lay down the known rule, that an estate gained by adverse possession is an absolute one, one on which ejectment can be maintained as well as one by which it may be defeated. But in no case but one has the point been passed upon which was passed upon by the Supreme Court of the United States in Gibson v. Chouteau, the point that if for any reason the holding of the disseizor was not adverse to the trustee, the estate of the *cestui que* trust was not barred. And that case is Cabanne v. Lindell, 12 Mo. 184, there the court asks: "If by the laws of the United States, a party has no title to the land, if it has not been appropriated to his own use, could the state impose on him the necessity of bringing suit within a given time under the penalty of losing his land? The remedy offered by the state the claimant might use or not at his pleasure, but as he claimed under the laws of the United States, and looked to them for the inception and consummation of his grant, he could not be compelled by state legislation, to bring suit until there was an actual appropriation of the land for his use in pursuance of the laws of the United States." This would surely go far towards justifying the language used in Gibson v. Chouteau. The case indeed of Barry v. Otto *et al.*, 56 Mo. 177, might seem from its lack of fullness to favor the views of the learned judge; but the only authority cited by the court in that case is Davis v. Thompson, 56 Mo. 39. with which for all that appears, it may be identical in principle. And Davis v. Thompson only announces the old rule that a party who has been in possession can recover against an intruder, though such party have no title whatever. But the learned judge proceeds to show why the view of the Supreme Court of the United States, as to the effect of a possession adverse to a *cestui que* trust must be incorrect. He says: "Such adverse possession being equivalent to a deed, the adverse possessors were on December 10th, 1861, the true owners of the so-called equitable or inchoate title and estate; that being such, they necessarily must be held to have been at that date the legal representatives of Jeanette in the land confirmed. * * * They are the patentees." If this is a statement of the condition of the defendants, on the supposition that they have already acquired the land by adverse possession, whether correct or not, it is not of course, and doubtless was not intended as an argument. If, however, as is probable, it is given as a reason why they should be held to have acquired the land prior to the issuing of the patent, it seems to me to be refined to untenability. It is true that if A. takes B.'s property, he may in a certain sense be said to represent B. till, B. can recover it. But this can be only on the *lucus a non lucendo* theory. Seriously, a disseizor, before or after the running of the statute of limitations, represents no one but himself. If he represents any one, before the statute has commenced to run it will not run at all; if he represents any one afterwards, it must be through the operation of some legal principle similar to that contained in the saying that extremes meet. A certain character results from that which has none of its constituent elements. The chrysalis becomes an oak.

But thereis a line of argument perhaps more satisfactory. The title gained by adverse possession is "an indefeasible one;" it is "one of the highest character." Washb. Real. Prop. 145, vol. 3, 3rd ed. If therefore the party holding it is, in any sense worth considering, the representative of the former owner, it would be only consistent, that the former owner should be deemed in all cases estopped to sue on a subsequently acquired title. And of course he is not. The mistake as to the relation between the disseizor and disseizee arises, I think, from hastily concluding, that because the statute transfers property to a certain extent as a deed, it therefore establishes the relation that is sometimes, at least, established by a deed. But the very nature of a disseizin makes it a truly initial point, and there is no more connection between the former and the present holder, than between the successive owners of a greenback or a table. A consideration of Langdeau v. Hanes, would belong to the general subject, but as it has not been examined in McRee v. Copelin *et al.*, and as I have already taken up too much space, I shall say nothing about it.

I may, perhaps, add that while it is fortunately impossible that Judge Jones should be displeased with my criticisms, he yet may feel surprised at it; may be inclined to mutter something about "fools rushing in," etc. But I would ask the learned judge to remember that a critic, however incompetent, is, if he has a grain of sense, most likely to attack what he is least likely to conquer. For if he succeeds, there is glory; if he fails, there is no disgrace. Judge Jones can only escape review by dropping down nearer to the level of his reviewers.

H. I. D'ARCY.

ST. LOUIS.

—THE prosecution of Loader and Price, indicted for perjury in connection with the Tilton-Beecher trial last year, was discontinued on the application of the district attorney for a *nolle prosequi* before Judge Moore in the Court of Sessions to-day. The ground of the motion was that the affidavits of these persons were not made to be used in court, but simply to affect public opinion.

—THERE was a large attendance in the Supreme Circuit Court before Judge Westbrook the other morning, the two suits against Wm. M. Tweed for six million and one million dollars, respectively, being the first and second on the calendar. Wm. M. Tweed, Jr., was the only member of the Tweed family present. Argument was begun by David Dudley Field's challenging the array of the twenty-four struck jurors on case number one. The court declined to set down case number two for any particular day until the defendant's counsel had seen the papers.

Bills and Notes—Bona Fide Holder—Burden of Proof where a Note Illegal or Fraudulent in its Inception is transferred before Maturity.

THE ROCK ISLAND NATIONAL BANK v. E. J. NELSON.

Supreme Court of Iowa, October Term, 1875.

Hon. WILLIAM E. MILLER, Chief Justice.
" C. C. COLE, }
" J. G. DAY, } Judges.
" J. M. BECK, }

1. Bills and Notes—Void by Statute—Bona Fide Holder.—A note made void by statute is void, even in the hands of a *bona fide* holder for value who purchased before maturity, unless his rights are saved by statute.

2. ——. Rights of Purchaser before Maturity—Burden of Proof where there is Fraud or Illegality in the Inception of.—Where fraud or illegality in the inception of a note is shown in defence to an action thereon by an indorsee, the burden is cast upon the plaintiff to show that he purchased it in good faith, for value, before maturity. It is not enough in such a case to show that he purchased the note before maturity.

Action upon two promissory notes. The defendant answered that the notes were given for intoxicating liquors, sold to defendant with a knowledge of the laws of Iowa on that subject, and with the intent to violate them, and to enable defendant to sell the liquor in violation thereof; and that the notes were transferred to plaintiff after maturity and without any valuable consideration. There was a trial by the court with finding and judgment for the plaintiff. Defendant appeals.

F. M. Dance, for appellant; *Shoemaker & Brown*, for appellee.

BECK, J., delivered the opinion of the court.

The defendant established, without any conflict of evidence, that the notes were given for intoxicating liquor, purchased with the intent to be again sold in violation of the laws of the state, of which the payee had full notice. He also introduced evidence tending to show that the notes were transferred to plaintiff after maturity. There was no intermediate holder of the paper between the payee and plaintiff. The plaintiff introduced evidence tending to establish that the paper had been indorsed to him before maturity. There was no evidence showing that plaintiff had paid a valuable consideration for the notes, and nothing showing his want of notice of the infirmities of the paper. The defendant insists that the judgment was not authorized, in the absence of evidence showing that the notes were purchased by plaintiff for a valuable consideration, in good faith, and without notice of their illegality; that the burden of proof rested on plaintiff to show these things; while plaintiff maintains that, in order to defeat the notes, the burden rests upon defendant to show that plaintiff is a holder of the paper without having paid a valuable consideration and with notice of the infirmities of the paper. The question is as to burden of proof, whether it rests upon plaintiff to support his right to recover by proof of want of notice and payment of consideration, or upon defendant to show notice in plaintiff and the absence of consideration, in order to defeat the action.

The rule is well settled that when fraud or illegality in the inception of a note is pleaded as a defence in an action thereon, and supported by evidence, the burden of proof is cast upon the plaintiff to show "that he gave value for it, and that he is a *bona fide* purchaser before maturity." Woodward v. Rogers, 31 Iowa, 342, and authorities cited; Lane v. Kekle, 22 Iowa, 400; Smith v. Lac. Co., 11 Wall. 139; Clapp v. Cedar Co., 3 Iowa, 15. But plaintiff insists that this rule is not applicable to the case before us, because of the provisions of the Code, § 1550. The statute declares that all sales and contracts for the sale of intoxicating liquors, to be used in violation of the law of the state, are void, and no recovery can he had therefor. But it closes with this language: "Nothing, however, in this section shall affect, in any way, negotiable paper in the hands of holders thereof in good faith for a valuable consideration, without notice of any illegality in its inception or transfer, * * * and all evidence given, in action brought by or against such holders, shall be in no way affected by the provisions of this section." It is argued that the last clause of this quotation is intended to protect the indorsees of commercial paper given for intoxicating liquors, sold in violation of the laws of this state; and surely such is the intention of the exception. But it as certainly makes no change in the rules of evidence, so that the burden is shifted from the party upon whom it would otherwise rest. In the absence of the whole of the provision quoted, a *bona fide* holder could not recover; as the law stands he may, but he must establish his right under the rules of evidence applicable alike to all cases. The last clause of the quotation, in the use of the term "such holders," refers to "holders in good faith, for a valuable consideration, without notice," etc., mentioned in the first clause, not to holders generally. The use of the word "*such*" unmistakably indicates that "*holders*" of the character named are referred to, and no others. Now, as nothing is found in the statute providing upon which party the burden of proof is cast, where issues are formed and tried involving the question of the *bona fides* of the holder of fraudulent or illegal commercial paper, we must look tothe law of evidence for rules upon that subject. When, under these, they are shown to be *bona fide* holders for value and without notice, evidence showing the paper to have been given for intoxicating liquors sold in violation of the law of the state, shall in no manner affect their right to recover thereon. This is the plain meaning of the statute—nothing less and nothing more.

The judgment of the district court is REVERSED.

NOTE.—If the court had placed its decision in the foregoing case upon the ground that the statute made the note void, with an exception in favor of a purchaser in good faith, before maturity, there could be no question of its soundness. Of course if the common law, or law-merchant, is as stated in the opinion, the requirements of the statute would not change the common law rule in regard to the burden of proof where commercial paper, fraudulent or illegal in its inception, has been transferred before maturity.

In Wyat v. Campbell, 17 Mood. & M. 80, where the contract was tainted with usury and would have been void but for the statute of 58 Geo. III. c. 93, which made the note valid in the hands of a *bona fide* holder for value; it was contended that the plaintiff was not required to prove that he paid value for it; but Lord Tenterden, C. J., held that as the statute made a note tainted with usury valid in the hands of a *bona fide* holder for value, the *onus* was upon the holder to prove that he was such; for otherwise the saving statute would not apply and the note would be void by the statute of Anne.

Paton v. Coit, 5 Mich. 505, was an action on a bill of exchange by endorsees against the maker. Defence that the bill was given for intoxicating liquors sold in violation of the prohibitory liquor law of that state which made such paper "utterly null and void against all persons, and in all cases, excepting only as against the holders who may have paid therefor a fair price, and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration." In construing this statute the court said: "When the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of this, he gives evidence of those facts which alone can bring him within the exception."

But we think the doctrine recognized by the principal case, that where a note is shown to have been obtained by fraud or to be affected with illegality, the burden of proof is shifted to the holder to show that he purchased it in good faith for value before maturity, is not only supported by the great weight of authority, but is eminently just. The reason for the rule as stated by Baron Park in the leading case of Bailey v. Bidwell, 13 Mees. & W. 73, is that "if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of illegality would dispose of it, and would place it in the hands of another person to sue upon it."

In Woodward v. Rogers, 31 Iowa, 342, the defendant introduced evidence tending to prove that the note sued on was procured by the fraud of the payee, and was given without consideration. The court excluded this evidence, on the ground that there was no evidence that the plaintiff was not a *bona fide* holder for value before maturity. *Held*, that it was error to exclude such evidence, and that it cast upon the plaintiff the burden of showing that he was a purchaser in good faith before maturity, for value. And to the same effect see Lane v. Krekle, 22 Iowa 400; Munroe v. Cooper, 5 Pick. 412; Perrin v. Noyes, 39 Me. 384; Gray v. Bank etc., 29 Penn. St. 365; Smith v. Lac. Co., 11 Wall. 139; Tucker v. Morrill, 1 Allen, 528; Sistermans v. Field, 9 Gray, 331; Sanford v. Norton, 14 Vt. 228; Atkinson v. Brooks, 26 Vt. 574; Paton v. Coit, 5 Mich. 505; Edmunds v. Groves, 2 M. & W., 642; Bingham v. Stanley, 22 B. 117; Harvey v. Townes, 6 Exch. 656, 4 Eng. L. & Eq. 531; Hall v. Featherston, 3 Hurl. & Norm. 284. "A most salutory rule for the prevention of fraud," Hogg v. Skeen, 114 Eng. Com. Law. Rep. 426; Ellicott v. Martin, 6 Md. 509; Vather v. Zane, 6 Gratt. 246; Holme v. Karsper, 5 Binn. 469; Woodhull v. Holmes, 10 Johns. 231; Cummings v. Thompson, 18 Minn. 246; Porter v. Knapp, 6 Lans. 125; Bank v. Ryan, 21 La. Ann. 551; McKesson v. Stanberry, 3 Oh. St. 156; Bank v. Gibson, 5 Duer, 574; Bertrand v. Barkman, 8 Eng. (Ark.) 150, Rogers v. Morton, 12 Wend. 484; Clark v. Thayer, 105 Mass. 216; Wyer v. Bank, 11 Cush. 51; Sperry v. Spaulding, 45 Cal. 544; Kinney v. Krouse, 28 Wis. 188; Sloan v. Union Bank, 67 Penn. St. 470; 1 Sm. Lead. Cas. [* 610]; Redf. & Big. Lead. Cas. Bill and Notes; 198-9; 1 Pars. Notes and Bills, 188; Edwards on Bills, 318-19.

But nothing short of fraud or illegality will impose the burden of showing good faith upon the holder. A partial or total failure of con-

sideration, payment, or matters going to discharge the instrument, arising after its delivery to the payee, will not shift the burden of proof. Sloan v. Union Banking Co., 67 Penn. St. 470; Smith v. Braine, 3 Eng. Law and Eq. 379. Phelan v. Moss, 67 Penn. St. 59; Atlas Bank v. Doyle, 9 R. I. 76. And it was held in Kinney v. Kruse, 28 Wis. 188 per Dixon, C. J., that "the fraudulent putting in circulation of a negotiable instrument which operates to change the burden of proof and call upon the plaintiff to prove his title as a *bona fide* holder, is where this is done fraudulently *as to the defendant or maker*, and not where it is so done as to the payee or some intermediate holder or party to the paper."

A different rule seems to obtain in Missouri, in Corby v. Butler, 55 Mo. 398, the petition alleged that plaintiff's testator purchased the notes in suit for value before maturity. The defendant answered that the notes were obtained by fraud, and that the plaintiff's testator did not take them in the usual course of trade, for value and without notice of the alleged fraud. On the trial the plaintiff introduced evidence tending to show that her testator took the note before maturity as collateral security for a loan. The defendant then offered to prove the facts set up in his answer constituting the fraud, but this court excluded the evidence on the ground that it appeared that the notes had been transferred to the testator by delivery, for value before maturity. In affirming the judgment for the plaintiff, Adams, J., said: "The court committed no error in excluding the testimony offered by the defendant, to prove the alleged fraud in procuring the notes. There was no foundation laid for the introduction of such proof. There was no evidence tending to show that the testator took the notes without value, or after maturity, or not in the usual course of trade, or with notice of the alleged fraud. It would have been improper to admit evidence of the fraud without first laying a foundation for its admission." The same doctrine is recognized in Horton v. Bayne, 52 Mo. 531.

The Missouri cases recognize a difference between the case of a note which comes to the holder after having been lost or stolen, and one obtained or put in circulation by fraud or undue means; in the former case they require the holder to show that he is a *bona fide* holder; but the authorities generally do not recognize the distinction. The rule in the principal case seems to be recognized it Shirts v. Overjohn, 2 CENT. L. J. 423.

In Hamilton v. Marks, 52 Mo. 78, it was held that express notice need not be brought home to the holder of the note, but that it would be sufficient to show circumstances of such strong and pointed character as would necessarily cast a shade upon the transaction and put the holder on enquiry. And it was held that an instruction asked by the defendant in the following words ought to have been given: "The jury are instructed, that if they believe from the evidence that the note sued on was obtained by Cooley from the defendant, Marks, by fraud practiced upon him by said Cooley; then in order to affect the plaintiff with such fraud, it is not necessary that he should have had actual and positive knowledge of such fraud before the assignment of said note to him; *but that is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life.*" And in referring to the English decisions holding that no amount of negligence in the holder, not amounting to bad faith, will defeat his right to recover as a *bona fide* purchaser, the court said the doctrine recognized in the instruction "has too solid a foundation in principle to be now overturned or shaken by the recent English decisions. * * * We think the old doctrine is the better rule, and is supported by the weight of authority and reason, both in England and America."

In State *ex rel.* Lexington, etc., R. R. Co. v. Saline County, 45 Mo. 249, it was said: "The relator claims the benefit of the protection given innocent holders of such paper, inasmuch as the consideration has been paid by building the road. But an innocent holder is something more. He must not only have paid a consideration, but be without notice, and have used all proper diligence to be informed." The same rule is declared in Henderson v. Bondurant, 39 Mo. 372.

We can not agree with the statement that the so-called "old doctrine" is supported by the weight of authority in England and America. The doctrine was first announced in Gill v. Cubitt, 3 Barn. & Cress. 466, in conflict with a long and uniform line of decisions, and after being adherred to for about twelve years, was repudiated in Goodman v. Harvey, 4 Adol. & Ellis, 870, in which Lord Denman, delivering the opinion of the court, said: "We are all of the opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for a bill; gross negligence may be evidence of *mala fides*, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." And such has been the law of England ever since. In Lawson v. Weston, 4 Esp. 56, where a bill of exchange for £500 had been lost or stolen, and was discounted by plaintiff from a stranger, the defendant urged that a person should not discount a bill for one unknown without using diligence to enquire into the circumstances. But Lord Kenyon answered, that "to adopt the principle of the defence would be to paralyze the circulation of all paper in the country, and with it all commerce; that the circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiff."

The rule re-established in Goodman v. Harvey, is followed in most of the states, and is approved by all the leading text writers.

In Goodman v. Simonds, 20 How. 343, after a most elaborate examination of the authorities, it was held that nothing short of bad faith would overcome the title of a holder of a bill of exchange placed in his hands by the drawer as collateral security for a debt; and that the burden of proof was on the defendant to show such bad faith, even though the evidence might have caused one of ordinary prudence to suspect that the drawer had no authority to use the bill for his own benefit, and even though the holder might have discovered this fact by the exercise of ordinary diligence. And see Bank v. Neal, 22 How. 96; Murray v. Lardner, 2 Wall. 110. In this last case Mr. Justice Swayne, delivering the decision of the court, said: "The rule laid down in the class of cases of which Gill v. Cubitt, is the antetype, is hard to comprehend, and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than another; and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs."

In Phelan v. Moss, 67 Penn. St. 59, where the uncontradicted evidence was that the whole transaction was "a fraud and a swindle on the defendant, he having signed the note thinking it a contract making him agent for a patent washing-machine; and where the plaintiff purchased the note for $100 from a man who said he gave that sum for it, but who said he did not know what the note was given for, he having obtained it in New York in a trade,—it was held that neither gross negligence nor the fact that the holder took the note under such circumstances as ought to excite suspicion in a prudent man, would vitiate his bill; that to do that *mala fides* must be shown. And the same rule was applied to a fraudulent hay-fork note which the holder purchased at a discount of 50 per cent., with a guaranty that it should realize that amount. Bank v. McCoy, 69 Penn. St. 204. In addition to the other fraud, in this case the defendant was so drunk when he signed the instrument as to be wholly unconscious of what he was doing. Speaking of the rule in Goodman v. Harvey, the court said: "The rule therefore adopted by the English courts one hundred and twelve years ago, and which has stood the test of practice and experience of the greatest commercial country of modern times, is now the undisputed and settled law of England."

The rule in Goodman v. Harvey, is recognized in the following cases: Brush v. Scribner, 11 Conn. 388; Hall v. Wilson, 16 Barb. 548; Magie v. Baker, 30 Barb. 246; Welch v. Sage, 47 N. Y. 143; Seybel v. Bank, 54 N. Y. 288; Chapman v. Rose, 56 N. Y. 137; 1 CENT. L. J. 242; Hamilton v. Vought, 34 N. J. L. 187; Halcomb v. Wyckoff, 35 N. J. 35; Ellicott v. Martin, 6 Md. 509; Crosby v. Grant, 36 N. H. 273; Mathews v. Poythress, 4 Ga. 287; Worcester Bank v. Dorchester Bank, 10 Cush. 488; Lake v. Reed, 29 Iowa. 258. In this last case it was said: "The American authorities are not essentially different from the English in their present course and conclusion. The early and present doctrine is that the right of a *bona fide* holder for value, in the usual course of business, of negotiable paper can not be defeated by proof that he was negligent, and omitted to make enquires which common prudence would have dictated." Gage v. Sharpe, 24 Iowa, 15. Must prove "full knowledge." Kettle v. DeLamater, 3 Neb. 325; Cooper v. Nock, 27 Ill. 301; Saddler v. White, 14 La. Ann. 177; Ames v. Merriam, 98 Mass. 294; Wyer v. Bank, 11 Cush. 51; Spooner v. Holmes, 102 Mass. 503; 1 Pars. N. & B. 258; Miller v. Finley, 26 Mich. 249; Borden v. Clark, 26 Mich. 410.

It is admissible to show that the paper was taken under suspicious circumstances, as tending to prove *mala fides*. It is not necessary to show bad faith by direct proof, but it must be borne in mind that the thing to be proven is not negligence in taking the paper under the circumstances, but that it was not taken in good faith. Backhouse v. Harrison, 5 B. & Ald. 1098; Goodman v. Harvey, *supra;* Cunliffe v. Booth, 3 Bing. N. C. 821; 1 Sm. Lead. Cas. [*608]; Hamilton v. Vought, 34 N. J. L. 187; Sistemans v. Field, 10 Cush. 331. While ordinarly it is immaterial that the holder received a bill or note at a great discount (Vinton v. Peck, 14 Mich. 287; Bank v. Green, 33 Iowa, 140; Durant v. Banta, 3 Dutch. 623; Brown v. Penfield, 36 N. Y. 473), yet if the amount paid is so grossly inadequate as to raise the presumption of fraud, the rule is otherwise. As where a note for $300 was purchased for $5. DeWitt v. Perkins, 22 Wis. 473, but in Bailey v. Smith, it was held that the holder must have paid *fair and reasonable* value, regard being had to the circumstances. But the tendency of the authorities seems to be otherwise. The fact that a note tainted with illegality or fraud was purchased for a consideration largely below its face would be a circumstance, to be taken in connection with other circumstances as bearing on the question of good faith.

The endorsee must take notice of defect patent on the face of the note, but is not required to scrutinize it closely to discover defects. Birdsall v. Russell, 29 N. Y. 220; Seybel v. Bank, 54 N. Y. 288; Dutchess Co. v. Hatchfield, 1 Hun, 675; Commonwealth v. Emigrant, etc., 98 Mass. 12; Hall v. Hale, 8 Conn. 338. Knowledge of the consideration is not sufficient to put holder on enquiry, even though the note was given for a patent-right; nor is it sufficient to vitiate his title that he purchased from a stranger; nor that he took it in payment of a debt or as a collateral security for a pre-existing debt. Swift v. Tyson, 16 Pet. 1; Redf. & Big. Lead. Cas. Bills & Notes, 186, and *note*. But where a note invalid as between the original parties, is held as a pledge or as collateral security, the holder can only recover from the maker the amount of his debt at the time judgment is rendered. Baxter v. Little, 6 Metc. 7; LaCroix v. Derbigny, 18 La. Ann. 27; Atlas Bank v. Doyle, 9 R. I. 219; Mathews v. Rutherford, 7 La. Ann. 225. But a mere equitable interest in a note will not avail the holder against the equities of the maker. The older equity will prevail. Muller v. Pondin, 55 N. Y. 325. A note payable to order transferred by delivery, without endorsement, is subject to any defence that could be made against it in the hands of the payee, even though such a holder may maintain suit thereon in his own name. Seymour v. Lyman, 10 Ohio St. 283; Crosby v. Roub,

16 Wis. 645; Younker v. Martin, 18 Iowa, 143. And so where the note was purchased before, but indorsed after maturity. Bank v. Taylor, 100 Mass. 18; Clark v. Whitaker, 50 N. H. 474.

The fact that there is interest due on a note at the time of the endorsement does not put the purchaser on enquiry, nor is it equivalent to a purchase after maturity. Boss v. Hewitt, 15 Wis. 260; Bank v. Kerby, 108 Mass. 497; but otherwise where a note payable in installments is negotiated after default in one installment. Vinton v. King, 4 Allen, 562. It was held in Boss v. Hewitt, *supra*, that where several notes secured by the same mortgage, were transferred after one of them was due, the holder was not chargeable with notice of the fraud in the inception of the unmatured notes. This can seem also to hold that the equities of the maker could not be set up as to the unmatured notes against the mortgage. It is well settled that the negotiable character of a note does not extend to a mortgage given to secure it; as to the mortgage, fraud may be set up even as against an innocent holder. Potter v. McDowell, 43 Mo. 93; Heller v. Meis, 2 Cin. S. C. Rep. 278; Baily v. Smith, 14 Ohio, 402.

The distinction between taking a note under suspicious circumstances, and in the regular course of business is sometimes lost sight of. In Roberts v. Hall, 37 Conn. 205, the following formula was stated for determining whether a given transaction was in the regular course of business: "Would a business man of ordinary intelligence and capacity, receive commercial paper, when offered for the purpose for which this was transferred, as money, and upon its credit, part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction."

We can not think so. At best the answer would only tend to determine the *bona fides* of the transaction, and not whether it was in the course of trade. A note may be taken in the course of trade in the worst of faith, or in the best of faith and not in the regular course of business. The term is of very little practical importance; it means much or little according to the sense in which it is employed; but just what it does mean, and just what limitations it imposes no one has ever been able to tell. It is said to be a mixed question of law and fact; and we think it is—so mixed that the traditionary Philadelphia lawyer could not unravel it. It is a set form of speech that sounds well, and has survived the demise of many other less euphonious legal fictions.

Gill v. Cubitt, was followed in Gould v. Stevens, 43 Vt. 125, where a party purchased a note given for $300 at a discount of $50, from a stranger who refused to guaranty its payment. The court said: "The circumstances were such as to excite suspicion, and lead a prudent man to suppose there might be something relating to the note that rendered it invalid. This was and is the tendency of the circumstances disclosed by the testimony of Benton himself. The maker of the note was apparently good, and of this Benton had knowledge. A stranger to Benton called upon him and offered to make, and did make, a large discount on the note, in the sale of it, and refused to guarantee its payment. Benton did not know or have any communication with the payee of the note. These facts were sufficient to put Benton on enquiry, and it can not be assumed that he would not have learned anything about the consideration of the note. If he had enquired of the maker of the note, he would, most likely, have learned that the note was given for a patent right; that the payee represented it valuable; that he had not tested it, and whether it was a valid note or not would depend upon future experiments with the fork. We think the case should have been submitted to the jury to determine, upon the evidence, whether Benton, on a reasonable enquiry, could have ascertained that the note was without consideration."

The Supreme Court of Illinois carries the doctrine of Gill v. Cubitt, to extreme length, requiring the purchaser of a note to exercise even greater diligence than the maker. See Taylor v. Atchison, 54 Ill. 196; Sims v. Brice, 67 Ill. 88; 2 CENT. L. J. 689. In this last case the defendant who (as usual) "could not read writing very well," although, as the record states, he could read the note very readily on the trial, signed the note thinking it was a contract making him agent to sell machinery. The court said: "In this case the evidence tended to show that appellee did not act recklessly, but, on the contrary, he commenced reading the papers, and his team becoming restive, he was compelled to desist, to keep them from running, and was thus prevented from reading further. Again appellants were dealing with a stranger, and if they knew he was an agent selling such machinery, it was enough to arouse their suspicions. Both parties must exercise prudence, and either failing to do so, will render him liable."

These Vermont and Illinois cases are a forcible illustration that hard cases frequently make bad law.

It is too well settled to require the citation of authorities that knowledge that a note has for its consideration a given contract, is not sufficient to put the purchaser on enquiry, unless he has notice of some infirmity, or breach of the contract; nor is it sufficient to put him on enquiry that the note is presented by a stranger; for negotiable paper is almost as frequently taken from strangers as from acquaintances. If, however, the fact that a note is presented by a stranger, who has the additional qualification of being a patent-right vender, is sufficient to put the endorser of a note on the defensive, it would seem reasonable to require the maker to use at least ordinary diligence in its execution. It can hardly be said that one who signs a contract with a stranger, is excused from reading it because he can not read with great ease and facility, or because his horses are a little under the influence of their oats, and require some attention. Nor is notice that a note was given for a patent right sufficient to put the purchaser upon enquiry. In deciding one of this class of cases (Miller v. Finlay, 26 Mich. 249) the Supreme Court of Michigan said: "The proof must show that the holder for value, who takes a note with no earmarks of fraud or illegality, has had notice of such a nature that he *could not honestly take the paper without further enquiry*. The facts of which he must have either knowledge or notice must be such as go to defects of title. * * * The court declined to instruct the jury that notice that the note was given for a patent right would not be sufficient to charge the plaintiff. Whatever may have been the experience of our people with itinerant patent venders, it can not be properly assumed as a fact, that a patent, regularly issued by the department, lacks either novelty or utility. And as a fraud can never be presumed without proof, the jury could not properly be charged upon any theory supported by no evidence at all." And see Shirts v. Overjohn, 2 CENT. L. J. 423, and *note*. M. A. L.

Sale of Good-Will—Partial Merger of Oral Agreement in a Written Agreement.

EDWIN DOTY v. PATRICK MARTIN.*

Supreme Court of Michigan, October Term, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" THOS. M. COOLEY, }
" JAS. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON, }

1. Merger of Oral in Written Agreement.—Instruments of conveyance embodying the term of a contract may sometimes be executed and delivered in full performance of an oral agreement, and may even vary it, and then the oral agreement is considered as merged in the written.

2. Parol Evidence as to so much of an Oral Agreement as has not been Merged in a Written Contract.—Where papers are executed and delivered in performance of a part only of an oral agreement, leaving some distinct portion untouched and unperformed, so much of the oral agreement as is left unperformed is not merged in the written agreement, and parol evidence to show what the actual agreement was is not then excluded.

3. Sale of Good-Will not within the Statute of Frauds as a Contract not to be performed within a year.—An executed oral agreement for the sale of the good-will of one's professional pratice is not void under the Statute of Frauds as a contract not to be performed within a year. When the practice is transferred, paid for, and entered upon, the parties have done what they could to make the transaction complete, even if the purchaser does not, within the year, reap all the benefits he expects from it.

Opinion of the court by MARSTON, J.

The bill in this case was filed to restrain the defendant from practising his profession of physician and surgeon at Maple Rapids and vicinity, contrary to the terms of an oral agreement alleged to have been entered into between the complainant and the defendant in August, 1872.

Complainant in his bill alleges, that he is a physician and surgeon, and that about the eighth day of August, 1872, he entered into an agreement with the defendant, who was then a resident and engaged in the practice of medicine and surgery, at Maple Rapids, whereby the defendant, in consideration of the sum of three thousand dollars, agreed to convey a certain house and piece of land to complainant, and also his practice as such physician and surgeon, and farther agreed that he, the defendant, would not thereafter practice his said profession in Maple Rapids or in that vicinity; that complainant, after entering into this agreement, removed to Maple Rapids, and immediately commenced the practice of medicine at that place, and has ever since and still continues in such practice; that upon moving to Maple Rapids, the defendant went with him to visit and introduce him to his patients; that the defendant, in pursuance of this agreement, quit his practice at this place, and soon after removed from the state of Michigan; that he has since returned and gone into practice again, and asserts and declares he will follow his business and profession in Maple Rapids and vicinity.

The defendant, in his answer, admits that complainant purchased the house and land referred to, which, he alleges, were owned by Elvira Terwilliger; that he, the defendant, negotiated the sale thereof to the complainant with the knowledge and consent of Mrs. Terwilliger, for the sum of three thousand dollars, and that on the 5th of August, 1872, Mrs. Terwilliger executed and delivered to complainant a warranty deed of the premises in consideration of the sum mentioned, a part of which was paid by an assignment of certain mortgages to Mrs. Terwilliger, and by the execution and delivery to her of certain notes secured by mortgage for the balance.

The defendant farther admits that prior to this purchase of the real estate, he endeavored to sell to complainant his practice for the sum of one thousand dollars; that he informed complainant he intened to leave Maple Rapids, but that com-

*Reported for this Journal by HENRY A. CHANEY, Esq., of Detroit, Mich.

plainant refused to purchase his practice, and he denies that he ever sold his practice to complainant, or agreed with him not to return to, and continue, his practice, should he at any time deem it proper so to do.

We have carefully examined the evidence in this case, from which it clearly appears that the defendant originally purchased the lots which were conveyed to complainant, and took the contract in his own name for the same, and that a portion, at least, of his means and labor, went into and was used in the erection of the building situate thereon; he afterwards made certain improvements in and around the house; that defendant's wife is the adopted daughter of Mrs. Terwilliger, and that this property was sometime in 1862, conveyed to Mrs. Terwilliger, and defendant testifies that the consideration for this conveyance was money and means supplied him by Mrs. Terwilliger and her husband, during his course of studies, on condition that if he was ever able, he should refund the same. The amount of money thus advanced to defendant does not appear very clearly, but it was somewhere in the neighborhood of one thousand dollars.

It is also beyond dispute that defendant in conversation spoke of and treated this property as though it belonged to him; that he tried to sell it and his practice, asking three thousand dollars for the premises, and one thousand dollars for his practice, and that he refused to sell the premises unless he sold his practice also. He testifies that he had a conversation with complainant about the sale of the premises and of his practice; that he told complainant he was going away. He says: "I stated to him, the complainant, that I was going away sure; that I had bought a patent right; that I wanted some good man to take my place; I told him that I wanted to sell *my property if I could sell my practice;* that I wanted a thousand dollars for my practice and position; * * I told him I wanted three thousand dollars for my place, and a thousand dollars for my practice." The direct evidence in this case establishes the fact to our satisfaction that an agreement was entered into between the complainant and defendant by which the latter agreed to sell his premises and practice to the complainant for the sum of three thousand dollars. To present all the facts here which lead us to this conclusion would render this opinion unreasonably long, and would be of no use or benefit to any except the parties directly interested. The surrounding circumstances all point to the same conclusion, and would seem to place the facts of such an agreement having been entered into, beyond dispute. It is very certain that the house and lots were not worth more than two thousand dollars. Why, then, should complainant agree to pay three thousand? If he intended or desired to settle in Maple Rapids he could doubtless have purchased other property at a fair valuation. The defendant had informed him that he, the defendant, was going to leave Maple Rapids at all events, and engage in the patent-right business, so there could be no inducement or reason for his giving defendant one thousand dollars more than the premises were worth in order that defendant might do that which he had already announced his determination to do. Defendant had repeatedly declared that he would not sell the premises unless he sold his practice, which he valued at one thousand dollars, at the same time; and we fail to find any good reason why, in dealing with complainant, he should have abandoned this, his intention, and sold the premises without his practice. The consideration of three thousand dollars would be the fair value of the premises and practice, whereas, for the premises alone, it would be an exorbitant price and one not likely to be paid under the circumstances.

There is one other reason leading to the same conclusion. There is nothing in the record tending to show that at the time this agreement was entered into, the defendant had any intention of ever again resuming his practice at that place. He was about to leave the state and engage in other business, which he considered more profitable. Would he be likely, under such circumstances, to retain that which could be of no possible benefit to him where he was going? Is it not altogether more probable that as an inducement to complainant to purchase the premises, he would let him have his practice also; more especially if he could obtain a better price for his premises thereby? We think this is altogether the more reasonable and probable view. Then the defendant's admissions to parties after the sale, which he does not deny having made, —his refusals to visit patients when sent for, assigning as a reason for such refusals, that he had sold his practice to complainant,—all point to the same conclusion, and leave no doubt in our mind but that such an agreement as is charged was actually entered into.

Counsel for defendant insist that even should we find such an agreement to have been entered into, the same was merged in the written contract between complainant and Mrs. Terwilliger.

This position can not be sustained.

First. There was no written contract entered into by and between Mrs. Terwilliger and complainant. The title to the real estate stood in the name of Mrs. Terwilliger; she conveyed the same by deed to complainant, he assigning and executing certain notes and mortgages to her in payment thereof. This was done in accordance with the oral agreement, and was to that extent a performance of the same. The object for which the deed, mortgage and assignments were made was not for the purpose of stating the contract between the parties, or reducing it to writing. The only object was to pass the title to the real estate from Mrs. Terwilliger to the complainant, and to secure to her the payment of a certain amount of money. Such instruments may in certain cases, be executed and delivered in full performance of an oral agreement, and even vary such agreement. In all such cases, the oral agreement would be considered as merged in the wrtten while in other cases they would be executed and delivered as a performance of a part only of the oral agreement, leaving some separate and distict portion untouched and unperformed, and here the unperformed part would not be merged. In other words the execution of a deed and mortgage back can not be conclusively presumed to embrace all that was agreed upon between the parties, so as to exclude parol evidence of what the actual agreement was under and in part performance of which they were executed. Suppose after Mrs. Terwilliger had conveyed the premises to complainant, he had refused to perform on his part, would she thereby be precluded from proving what he had agreed to do? Or had Mrs. Teriwilliger agreed to convey the premises, and also the furniture in the house situate thereon to the complainant for a certain sum, and after conveying the premises and receiving the consideration, had refused to deliver up possession of the furniture, would the rule we are now considered prevent complainant from proving that he had purchased and paid for the furniture also? We think not. See Linsley v. Lovley, 26 Vt. 133; Collins v. Tillon, 26 Conn. 374

Second. The title to the real estate being in Mrs. Terwilliger, the conveyance must come from her. She, however, could not convey to complainant the business mentioned in the other portion of the agreement, viz: defendant's right to and good-will of his practice. How, then, can it be said that the part of the agreement which the defendant was to, and Mrs. Terwilliger could not, perform, was merged in the deed to complainant and the execution of the securities by him back to Mrs. Terwilliger? Under such circumstances there could be no merger.

Counsel farther insist, however, that even if such a contract was entered into, it was void under the statute of frauds, as one not to be performed within one year from the time it was made.

This contract was entered into August 5th, 1872. The deed was executed the same day. On the 8th of August, 1872, the complainant entered into actual possession of the premises, and at the same time commenced the practice of his profession as a physician and surgeon. The defendant went with complainant on several occasions, introduced him according to the agreement, and shortly after, he and his family removed from Maple Rapids and remained away until November, 1873, leaving complainant, in the meantime, in the undisturbed enjoyment of the business so purchased by him.

Here then was a contract fully performed by the parties. There was nothing farther to be done by either. Each had fully and completely performed the contract on his part. It is true the complainant had not reaped all the benefits which it may be supposed he expected to derive from this contract. How long he should continue in the enjoyment of those benefits, if not interfered with, would depend upon other circumstances, over some of which, perhaps, he would have no control. The time might extend through one year or a series of years. The fact that he might, or even the certainty that he should continue the practice of his profession at that point for a number of years, would not bring the case within that clause of the statute which we are now considering. Suppose defendant had sold and delivered to complainant a horse, buggy and harness to enable him to practice his profession; would the fact that in all probability complainant would remain in the possession of such property for over one year, bring such agreement within this clause of the statute, make void the agreement, and enable defendant at the expiration of the year to claim the property? Yet wherein lies the difference?

Here was a sale of the right to engage in and carry on a certain business up to that time carried on by the defendant. This was a right which the law would have protected; it was property; it was valuable; it was the subject of sale, and these parties so understood and treated it. The defendant sold this valuable right to the complainant, and so far as he could, he put the complainant in possession of it. This was all he had agreed to do, and it was all he could do on his part to make the transaction complete. The complainant had paid for it as he agreed, so that, so far as these parties were concerned, the contract was fully executed and performed. Time was required only to enable complainant to reap the fruits of his contract, and the defendant had no longer the right or power to control, or in any way interfere with the complainant's enjoyment of what he had thus bargained for and received. In our opinion this case is not affected by the Statute of Frauds, and although there are other grounds for coming to the same conclusion, we consider the above sufficient.

The bill in this case is not strictly a bill filed for the purpose of enforcing specific performance of the agreement. It is filed for the purpose of restraining a defendant from violating a contract voluntarily performed by him, and from engaging in, or resuming a practice, contrary to his express agreement, and which of right belongs to and is the property of another, in a case where damages would not be a sufficient compensation for the continuous injury done and threatened, and where the remedy at law would otherwise be inadequate to afford complete relief.

Defendant also complains in that the decree perpetually enjoins him from practising his profession in Maple Rapids, or within a distance of six miles from that place. As the nearest villages of any importance are more than twelve miles distant from Maple Rapids, we do not think the defendant has any right to complain. If either has a right to complain on this account, it is the complainant, and not the defendant.

The decree of the court below must be affirmed with costs.

Right of Action for Injuries Resulting in Death—Construction of the Kentucky Statute.

PARISH v. DAVIDSON'S ADMR.

Court of Appeals of Kentucky, December 9, 1875.

Hon. B. J. PETERS, Chief Justice.
" WILLIAM LINDSAY, } Associate Justices.
" WM. L. PRIOR, } Associate Justices.
" MARTIN H. COOPER, } Associate Justices.

A statute of Kentucky enacts as follows: "If the life of any person is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid." *Held*, that this statute does not give a right of action for the loss of a life through the neglect or unskilfulness of a surgeon in dressing a wound, and that a petition which, with other proper allegations, stated that the defendant, a surgeon, "wholly failed and wilfully neglected and refused to comply with his said undertaking, and, on the contrary, so unskilfully, negligently and improperly attended, set and bandage, treated and cared for said fracture, that the life of plaintiff's intestate was thereby destroyed,"—was bad on demurrer.

Duvall, Leslie, Botts and *Nuckols* for appellants; *Lewis, Boles* and *McQuown*, for appellee.

PETERS, C. J., delivered the opinion of the court.

The appellee as administrator of Charles C. Davidson, deceased, brought this suit against the appellant, alleging, in substance, that in April, 1872, the intestate fractured the bone of his leg; and that the appellant, who was a practicing physician and surgeon, was employed to attend the deceased as such, and undertook and agreed, in consideration of a reasonable reward for his services, to treat, cure and heal said fracture; but that he wholly failed and wilfully neglected and refused to comply with his said undertaking, and, on the contrary, so unskilfully, negligently and improperly attended, set and bandaged, treated and cared for said fracture, that the life of his intestate was thereby lost and destroyed—that the death of his intestate was caused by, and through the wilful and wanton neglect by the appellant, of his duty, as surgeon and physician.

The appellant demurred to the petition, but his demurrer was overruled. He answered, and a trial was had, which resulted in a verdict for the appellee for one thousand dollars, and to reverse that judgment this appeal is prosecuted.

Did the court err in overruling the demurrer?

The appellee sought to recover alone for the loss of the life of his intestate. He did not allege that the intestate had suffered harm, or had been put to expense, or that he had in his life-time, sustained any injury whatever, in consequence of the negligence, or unskilfulness of the appellant, for which he could have maintained an action, if he had recovered. The sole ground upon which he sought to recover was, that his intestate's life had been lost, in consequence of the wilful neglect, and the unskilfulness and improper treatment of the fracture by the appellant.

It is well settled by a long and unbroken line of adjudications, that no action can be maintained at the common law, to recover damages for causing the death of a human being; and, it is equally well settled, that an action for a personal injury died with the person receiving the injury; and, although the decedent had a cause of action therfor, in his life-time, his personal representative could neither bring, nor revive such an action. This latter rule has been changed by statute, and now, as held by this court, in the recent case of Hansford's Admr. v. Payne, etc., 2 CENT. L. J. 722, an administrator may maintain an action to recover damages for injuries suffered by the intestate in his life-time, in consequence of the negligence of the defendant. But, as the appellee did not allege, or seek to recover for a cause of action, which accrued to his intestate, and which, according to the principle of the case *supra*, would have survived to his personal representative, but sought to recover alone for the loss of the life, it is clear that the action, for that purpose, can not be maintained, unless it is authorized by statute.

We have but one statute authorizing an action to be brought by a personal representative to recover damages for the loss of the life of a human being. That act is entitled "An act for the Redress of Injuries arising from the Neglect, or Misconduct of Railroad Companies, and others." 2 Stanton, p. 510. The first section of that act provides that if the life of any person, not in the employment of a railroad company, shall be lost by reason of the negligence, or carlessness of a railroad company, or the negligence, carlessness or unfitness of its agents, or servants, the personal representative of the person whose life is so lost, may institute suit and recover damages in the same manner that the person himself might have done, for any injury when death did not ensue.

The second section gives to the owner of stock injured, or killed, in consequence of the negligence of railroad companies, or their employes, a right of action to recover for such killing or injury.

The third section is in these words:

"That if the life of any person is lost or destroyed by the wilful neglect of another person, or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

It was under this section that the appellee sought and obtained a recovery in this case. The title of the act shows that the object of the legislature was to afford the means of obtaining redress for injuries arising from the neglect, or misconduct of the defendant; and that such was the sole purpose of the act, we think, is clear from its whole context.

The petition of the appellee shows that the intestate had his leg broken, and that the appellent undertook to treat and cure him of that injury; and the gravamen of the complaint is that he wilfully neglected and refused to comply with his said undertaking, in manner and form as he had promised and assumed; and on the contrary, so unskilfully, negligently and improperly attended, set, bandaged treated and cared for said fracture, that the life of said intestate was thereby lost and destroyed.

This amounts, simply to an allegation that, in consequence of the unskilfulness and wilful negligence of the appellant, in treating the intestate, the life of the intestate was lost and destroyed; not by any injury, inflicted by the appellant, or arising from his negligence, or misconduct but from his negligence in failing properly to treat, and thereby cure his patient.

We do not understand the petition as charging that the appellant inflicted any injury upon the intestate, but simply that he was so unskilfully, and negligently treated, that he died from the injury he had already received, which but for such unskilfulness and negligence, would have been cured.

We do not think such a case is embraced by the statute. Whether, if in attempting to treat the patient for the fracture, the appellant by his wilful negligence, had inflicted on

him a new injury, or induced a disease to spring up in the system, whereby his life was lost, he would be liable under the statute, we do not decide. But we are well satisfied that the petition does not make a case embraced by the statute.

This conclusion renders it unnecessary to consider other questions presented in the argument.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the petition.

NOTE.—The conclusion reached by the court seems to be that, in order to make out a case under the statute, there must have been some *direct* injury, *inflicted* on the plaintiff, by the defendant, which resulted in death; and that as the intestate, Davidson, died by reason of the improper treatment of the fracture, no injury, within the meaning of the statute, was done him. The court, therefore, holds that, in a case where a surgeon is called to treat a fracture, and by his wilful neglect and unskilfulness, causes his patient to die from the fracture, which, *otherwise, would have been cured*, no action can be maintained under the act of March 10th, 1854.

This interpetation of the statute gives to the third section a meaning that is hardly reconcilable with either the common and approved or technical meaning of the language.

It is averred in the petition that the defendant was called and undertook, as a surgeon, to treat the fracture; but that he "wholly and wilfully neglected, failed and refused, to comply with his said undertaking, in manner and form as he had promised and assumed; and, upon the contrary, so unskilfully carelessly, negligently, and improperly attended, set, bandaged, treated and cared for said fracture, that the life of the said Charles C. Davidson was, on—day of May, 1872, *thereby lost and destroyed;* that the death of his intestate was *caused and occasioned, by and through the unskilfulness, carelessness, wilful neglect, and improper conduct of the defendant, Parish, in attending, bandaging, treating and setting the said fracture.*"

While this may not amount to an allegation that an injury was *inflicted* upon the intestate, yet it is certainly averred that his life was "lost and destroyed by the wilful neglect" of the appellant.

It is difficult to perceive, from principle, why such a case is not "embraced by the statute." In Chiles v. Drake, 2 Met. (Ky.) 149, the defendant improperly presented a loaded pistol, in a room, where a number of persons were assembled, and while he held it in his hands, it was discharged unintentionally, the load striking and killing plaintiff's intestate. The action was sustained under the third section of this statute.

It is certainly as reprehensible to occasion death in the manner charged in the petition, as in the case cited; and, while, technically, an injury may not have been *inflicted* by a surgeon in this character of case, yet one necessarily *results*, or *arises* from the wilful neglect, by which the life is lost.

In the case stated in the petition, it is alleged that the defendant, Parrish, "so unskilfully, carlessly, negligently and improperly attended, set, bandaged, treated and cared for said fracture," that the life of the intertate was "thereby lost and destroyed." It is a well known fact that gangrene of a fatal character, frequently results from improper and careless bandaging, and negligent treatment of fractures. A tight bandage about a fractured limb, if negligently and constantly permitted to remain there, impedes the circulation and produces gangrene, which, in many instances, is as fatal, and certainly destructive of life, as any injury inflicted by a lethal weapon. Where, in principle, is the difference between death produced by gangrene, resulting from the "wilful neglect" of a surgeon, in treating a fractured limb, and death resulting from the negligent use of the pistol? In one case it is the negligent use of the pistol, and in the other, the negligent use of the bandage—the weapons, or instruments are different, but the results are the same. In each case life is lost and destroyed by "wilful neglect."

The contract of a surgeon, who attends his patient, is, that he will use all known and reasonable means to effect a cure; and that he will carefully and diligently attend him. His relation implies that he possesses, and will employ in the treatment of the case, such reasonable skill and diligence as are ordinarily exercised by thoroughly educated surgeons. Harise v. Reese, 7 Philo. 138. When by his wilful neglect death is produced, public policy would, therefore, seem to require, at least, as strict an interpretation of the law against him, as against others.

The title and different sections of the statute, are referred to and construed by the court, in order to show that the wrong complained of is not within the reason of the law.

The statute seems to have been intended, not to redress injuries *inflicted* upon the person within the literal meaning of the word inflict, but only such as *arise or grow out of* the neglect or misconduct of corporations and others. The injuries contemplated, especially in the third section, seem to be solely of that *negative* character, which arise from the want of care, attention, diligence, skill, and not from wilfully tortious actions. No right of action is given for the unlawful intention and individual destruction of life, as in murder or manslaughter. But if life is "lost, or destroyed by wilful neglect," an action may be maintained. Neglect, or negligence, has been defined to be the omission to do something which a reasonable man would do, or the doing something which a prudent and reasonable man would not do. 15 Wall. 524.

In the case of Chiles v. Drake, *supra*, in reviewing the action of the lower court in overruling the demurrer to the petition, the court of appeals held, that "in actions for personal injuries, resulting from negligence, it has always been regarded as sufficient for the plaintiff to allege, in general terms, that the injury complained of was occasioned by the carelessness and negligence of the defendant. 2 Chitty Pleading, 650."

Tested by a rule here laid down, it would seem that the petition is good. The charge is made, in general terms, that life was lost and destroyed, by and through the wilful neglect of the defendant, and the acts from which the injury and wrong arose, or resulted are distinctly averred.

L. M'Q.

Conspiracy to Commit Acts made Penal by the Bankrupt Act—Revised Statutes Sections 5132, 5440 Construed.

UNITED STATES v. JOHN BAYER *ET AL.*

United States Circuit Court, District of Minnesota, December Term, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. Who may Conspire—§ 5132 Revised Statutes.—Under the statutes (Rev. Stats. Secs. 5440, 5132), other persons than the bankrupt can *conspire* with the latter to commit the acts made criminal, under the seventh and tenth subdivisions section 5132 of the Revised Statutes.

2. ——. Aider and Abettor Liable to Indictment.—*It seems* that under criminal section of the bankrupt act (Rev. Stats., Sec. 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted though not expressly referred to in the statute.

Before DILLON, Circuit Judge.

The defendants are indicted for a conspiracy to commit offences against the United States in violation of the penal section of the bankrupt act (Rev. Stat., Secs. 5132, 5440). The indictment contains two counts. The first count, based upon section 5132, subdivision 10, and section 5440, after alleging the adjudication of the bankruptcy of one John Bayer by the District Court for the District of Minnesota, June 2d, 1875, and after setting forth the facts, showing the jurisdiction of that court in said matter of bankruptcy, proceeds to charge that the said John Bayer, and the defendants, Kargleder and Ober, within three months next before the bankruptcy proceeeings aforesaid were commenced, to wit: on June 1st, 1874, in said district, amongst themselves unlawfully and fraudulently conspired, confederated and agreed together to commit a certain offense against the United States, to wit: by the execution and delivery, then and there, by said John Bayer, of a certain instrument in writing signed by him, wrongfully and unlawfully and with intent to defraud the creditors of said John Bayer, to mortgage, sell and dispose of (while they still remained unpaid for as in the indictment alleged), to said John Kargleder, otherwise than by *bona fide* transactions in the ordinary way of the trade of said Bayer, certain goods and chattels of said Bayer which had been obtained on credit, etc. It is then alleged that said Bayer and said Kargleder thereupon performed certain specified acts in order to effect the object of said conspiracy.

The second count, based upon sec. 5132, subdivision 7, and upon sec. 5440, after repeating the preliminary averments of first count, further alleges the appointment of an assignee in bankruptcy of said Bayer's estate, and the proof in bankruptcy by said Kargleder of a false and fictitious debt against said Bayer's estate, and the said Bayer's and Ober's knowledge of the premises; and further charges the said Bayer, Kargleder and Ober did *then* unlawfully conspire and confederate together to commit an offense against the United States, to wit: did conspire and confederate together, that Bayer, knowing as aforesaid that Kargleder had proved a false and fictitious debt against his estate, should then and there and continually for more than one month thereafter fraudulently and unlawfully wholly fail, refuse and neglect to disclose the same to his said assignee in bankruptcy. It is then averred that in order to effect the object of said conspiracy, said Kargleder and Ober then and there falsely asserted and claimed, in the presence of said assignee, that said debt, so proven by said Kargleder, was a true, just and valid claim against Bayer for money loaned to him by Kargleder, and that in further pursuance of the conspiracy, the bankrupt Bayer then and for two weeks thereafter fraudulently failed, neglected and refused to disclose said fictitious debt to his said assignee in bankruptcy.

The defendants, Kargleder and Ober, move to quash the indictment, because no person, except a person respecting whom proceedings in bankruptcy are commenced, can com-

mit the offence; because the defendants can not conspire to commit an offense which they can not, in law, commit, and because a *nolle prosequi* has been entered as to Bayer, the bankrupt.

Morris Lamprey and *Reuben E. Benton*, for the motion; *W. W. Billson*, district attorney, opposed.

DILLON, Circuit Judge—The questions presented are important, and so far as the court is advised, are new. The leading objection, made by the counsel for the defendants, is that no person can be punished under the penal section of the bankrupt act (Rev. Stats., sec. 5132), except *the* "person respecting whom proceedings in bankruptcy are commenced;" that this section does not extend to those who counsel, aid and assist in the commission of the acts which that section makes criminal when committed by "*the* person respecting whom bankruptcy proceedings" are pending, and as a corollary, it is urged that if a person cannot himself commit a specified offense, he is necessarily incapable of conspiring with another or others to commit it.

This indictment is for *conspiracy*, and is based upon section 5440 of the Rev. Statutes, which provides that "if two or more persons conspire to commit any offense against the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc. The offense which it is alleged the defendants conspired to commit are acts made penal by the *seventh* and *tenth* subdivisions of section 5132 of the Revised Statutes.

It is not necessary to decide the main proposition relied on by the learned counsel for the defendants, which is that under section 5132 *no person*, except the one respecting whom proceedings in bankruptcy are commenced, can commit, or be punished for, the acts therein made criminal. Without intending to determine the soundness of this position, I must say that the result of the argument left my mind with a decided impression against it. It is true that the statute only mentions the debtor or bankrupt; but it is a statutory misdemeanor only that is created, and the general principle of the law is that all procurers and abettors of statutory offenses are punishable under the statute, although not expressly referred to in the statute. Bishop on Statutory Crimes, 136; Comw. v. Gannet, 1 Allen, 7; United States v. Harbison, 13 Int. Rev. Record, 118 (Judge Emmons), and cases cited *infra*. Moreover, it has been several times adjudged, upon full consideration, that it is immaterial that the aider and procurer is himself disqualified to be the principal actor in the offense by reason of not being of a particular age, sex, condition or class. State v. Sprague, 4 Rh. Is. 257; Boggus v. State, 34 Georgia, 275; Rex v. Potts, Russ. and Ry. Crown Cas. 352, 1 Bish. Cr. Law, 627, 629.

But if it be true that none but the bankrupt can be indicted under section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offenses against the United States. By section 5440, conspiracies to commit any offense against the United States are made punishable, provided some act is done to effect the object of the conspiracy. The statute is based upon the common law principle that *conspiring* to commit a crime is itself criminal, and the fact that one of the conspirators could not himself commit the intended offense, neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it.

The legal as well as moral guilt of all the conspirators is the same. One of the offenses which it is alleged the conspiracy was entered into to commit, was the defendants knowing that a false and fictitious debt against the estate of the bankrupt had been proved, they conspired together that the bankrupt should fail to disclose the same to the assignee; the other was in respect to a fraudulent disposition of the property of the person in bankruptcy to one of the alleged conspirators. Now, it is necessary to both of these offenses that another person besides the bankrupt should have been guilty of a violation of law, and if the bankrupt and such other person conspire together to commit the acts made criminal by the bankrupt law, and either does any act in pursuance of such conspiracy to effect its object, why should they not be punishable, although the relation of the parties to the criminal act is such that only one of them can commit the act itself? (Bishop on Crim. Law, sec. 432.)

The conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been completed is no *legal* bar to a prosecution for the conspiracy. United States v. Boyden, 1 Lowell, 266, 269, and cases cited; Regina v. Boulton, 12 Cox Crown Cases, part 3, p. 87; Regina v. Rowland, 5 Ib. 485, 487; United States v. Rindskopf, 21 Int. Rev. Rec. 326, 327.

The motion to quash the indictment is denied.

MOTION OVERRULED.

Removal of Causes.

KAIN v. TEXAS PACIFIC RAILROAD CO.*

United States Circuit Court, Eastern District of Texas, November Term, 1875.

Before Hon. THOMAS H. DUVAL, District Judge.

1. Motion to Remand—Irregularities in procuring order of Removal.—Where a cause has been removed from a state court to the proper federal circuit court, the federal court will not, if it otherwise would have jurisdiction, remand the cause on account of erroneous steps in the mode in which the cause was removed;—as where it was alleged that the petition to remove was was not filed in time; that it was not sworn to by the person properly authorized, and that the bond was not signed by the defendant (a corporation), in its corporate capacity.

2. ——. Sufficiency of Petition—Defence arising under Law of United States.—A petition which showed that the defendant was a corporation organized under certain acts of Congress (naming them), and that it had "a defence to the plaintiff's action arising under and by virtue of a law of the United States," was held sufficient—especially where, in answer to the motion to remand, the defendant showed that its domicil and chief office were in another state. It is not required that the petition for removal should show the particular part of the constitution, or the particular act of Congress, under which the defense exists, or that any averment be made as to how or in what manner the defense arises.

3. ——. Practice—Want of Jurisdiction, when shown.—The court, in this case was of opinion, on motion to remand, that it had jurisdiction of the parties and of the subject matter, but said that the want of jurisdiction might be shown at the trial,—since the act of 1875, makes it the duty of the federal court to remand the cause, if at *any time* after removal a want of jurisdiction shall appear.

4. ——. Acts of 1875 and 1868.—The act of 1875 relating to the removal of causes does not repeal that part of the act of 1868 upon the same subject which refers to corporations.

DUVAL, J.—Under the provisions of the act of Congress of July 27, 1868, in connection with that of the 3d of March, 1875, regulating the removal of causes from state courts, the defendant has removed this cause from the District Court of Harrison county in the state of Texas, to this court.

The transcript of the record was filed here on the 19th October, 1875.

The act of 1868 provides, in effect, that where a suit has been commenced in a state court, against any corporation, other than a banking corporation, organized under a law of the United States, for any alleged liability of such corporation, the same may be removed for trial, to the Circuit Court of the United States, for the district where such suit is pending, upon the petition of the defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the constitution, or of any treaty or law of the United States.

It appears from the record, that the suit was commenced in the District Court of Harrison county, on the 10th May, 1875. On the 15th June, 1875, defendant filed its petition, praying the removal of the cause under the act of 3d March, 1875, and giving bond therefor. It further appears that this motion to remove was subsequently, by agreement of the parties, continued until the fall term of said court, without prejudice to either, and with leave to defendant to amend his motion or petition. The defendant did so amend on the 21st September, 1875, and alleged that it was a corporation created and organized under and by virtue of certain acts of Congress of the United States, and that it had a defence to plaintiff's action arising under and by virtue of a law of the United States. This petition was sworn to by J. D. Davis, as solicitor of the defendant, and as authorized to appear and conduct suits for it in the state of Texas. A new bond for removal, under the amended petition, was given on the same day by defendant, and approved by the clerk of the state court. Thereupon the order of removal was granted by the Judge of the state court, and entered of record etc., and the transcript was filed here on the 19th October, 1875.

The plaintiff now files a motion to remand the cause to the District Court of Harrison county, for the following reasons, viz.:

1st. Because the petition to remove was not filed within the time prescribed by law, and was not sworn to by any person properly authorized, and because the bond given was not signed by the defendant in its corporate capacity, or under its seal, etc.

*For the opinion in this case we are indebted to Geo. L. Hill, Esq., of Marshall, Texas.

2d. Because the defendant is not a corporation of the Congress of the United States but is a corporation of the state of Texas, having its domicil in said state, etc.

3d. Because said petition does not show what defence the defendant has arising under an act of Congress, or in what manner such defence could arise, etc.

To this motion to remand, the defendant excepts and assigns several special grounds therefor, which it is not necessary to mention.

My opinion is, that the reasons set forth by the plaintiff in the first ground of his motion to remand this case, were matters properly addressed to the consideration and discretion of the state court. The judge there deemed that the petition for removal, the bond, etc., were made in compliance with the act of Congress, and gave the order for removal accordingly. While I do not consider that the action of the state court, in allowing the removal, would absolutely preclude this court from enquiring into its legality, yet when the case has been removed, and it appears that this court has jurisdiction over it, I should be unwilling to remand it on account of defects, occurring in the state court, in matters preceding the order of removal, unless they were of a more serious and vital character than those pointed out in the motion now under consideration.

As to the second and third grounds of the motion. The affidavit made by defendant in the state court, alleges that it is a corporation created and organized under and by virtue of certain acts of the Congress of the United States, to-wit, an act entitled an act to incorporate the Texas Pacific Railroad Company, approved March 3d, 1871—and an act supplementary thereto approved May 2d, 1875, and that it has a defence to the plaintiff's action arising under, and by virtue of a law of the United States. And in the answer to the motion to remand, the defendant avers that its principal office and domicil are in the city of Philadelphia, in the state of Pennsylvania. When a corporation, other than a banking corporation, is sued in a state court, the act of Congress of 1868, only requires for its removal to the proper Circuit Court of the United States, that it shall file a petition for that purpose, verified by oath, stating that such corporation has a defence arising under or by virtue of the constitution, or of any treaty or law of the United States. It is not required that the particular part of the constitution, or the particular act of Congress under which the defence exists, shall be set forth, or any averment made as to how or in what manner the defence arises. In this case, the defendant has stated what the statute requires, and this, it seems to me, is sufficient.

I am of opinion that the defendant showed a proper case for removal, and that so far as the record, this motion and the answer thereto discloses, this court has jurisdiction both over the parties and the subject-matter. The want of such jurisdiction, however, may be shown upon the trial.

The 5th section of the act of March 3d, 1875, provides that in any suit removed from a state court to a Circuit Court of the United States, if it shall appear to the satisfaction of said circuit court at *any time* after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy within its jurisdiction, the said court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed.

In accordance with the power thus given, if it should appear on the trial of this case, that this court was without jurisdiction; it would become its duty, as soon as this was made apparent to its satisfaction, to instruct the jury that it had no jurisdiction, and to dismiss or remand the case as it might think proper. Fisk v. Union Pac. R. R. Co., 6 Blatchford, 362, 394; The Mayor v. Cooper, 6 Wallace, 247, 254.

In considering this motion, I have regarded the act of 1868, as unaffected by the act of 1875, unless there be an actual conflict between them. Certainly there is no repeal of that provision of the act of 1868, which relates to corporations.

The exceptions of defendant to the plaintiff's motion are sustained.

—It has been recently decided in New York that theatrical performances on Sunday are illegal. Such a ruling would work havoc among certain theatres in this city.

—"Chock Wong, one of the editors of a Chinese paper at San Francisco, has declared his intention of taking out naturalization papers in the United States District Court, which will test the question of the right of Mongolians to become citizens." We clip this senseless paragraph from a daily newspaper. Of course a Mongolian may become a citizen of the United States if he is otherwise qualified.—*New York Herald.*

Removal of Causes.

THE MERCHANTS' AND MANUFACTURERS' NATIONAL BANK v. WHEELER.

United States Circuit Court, Southern District of New York, December, 1875.

Before Hon. Alexander S. Johnson, Circuit Judge.

1. Sufficient Application Ipso Facto removes Causes.—The rule is said to be well settled that the application to remove a cause is, if sufficient, effectual to remove the cause, however it may be disposed of by the state court.

2. Within what Time Application must by made.—Where the application to remove a cause was made during the term of the federal court which preceded the passage of the act of March 3d, 1875, and before the actual trial of the cause, but at the date subsequent to the passage of the act it was held to be in time. The statute should be construed to refer to a term occurring after the passage of the act of 1875. [Acc. Andrews' Ex'rs. v. Garrett, 2 Cent. L. J. 797.]

3. Removal After Issue Joined—Pleading.—Where a suit not in equity or in admiralty is removed after issue joined, no other or different pleadings are necessary than those filed in the state court.

Johnson, Circuit Judge.—The defendant's first application to remove these causes seems to have been abandoned, on account of defects supposed to exist in the papers presented to the state court. The subsequent application which is to be regarded as made on the 27th of April, 1875, avoided the defects of the papers used on the prior application. The rule being well settled that the application, if sufficient, by law is effectual to remove the cause however it may be disposed of by the state court, the question arises whether the defendant was in time under the act of March 3d, 1875. The act was passed after the commencement of the March circuit, and the application was made during the preceding circuit term, and before the actual trial of the cause. If, therefore, the statute means by the phrase "before or at the term at which the cause could be first tried," a term occurring after the passage of the act, then beyond question the application was in time. That such is the meaning of the statute many considerations concur to prove.

The act (Ch. 137 of the statutes of 1875) defines the jurisdiction of the circuit courts, making it as substantially as extensive as the constitution permits, excepting cases where the supreme court has original jurisdiction. It then proceeds to declare in substance, that every civil suit of which original jurisdiction might be be taken by the circuit court should, if brought in a state court, be removable into the circuit, whether then pending or thereafter brought. This is the grant of authority, and it defines the subject on which it is to operate as all suits, pending or to be brought. What follows is merely detail, as to the manner in which the power is to be exercised. It should receive a construction in harmony with the grant of power. By section 3, the party seeking a removal is to apply at or before the term at which the cause could be first tried. If this is taken to mean a term which occurred before the passage of the law, it to that extent renders nugatory the provision making all suits removable, and excludes from the privilege that large number of cases in which a term at which the cause could be tried had previously passed by. There is no reason for such a distinction, and the clause should be construed to relate to a term occurring after the act in question became a law. The question has been examined and decided in the same way by Judge Swing of the Southern District of Ohio, in Anderson's Executors v. Garret, 2 Central Law Jour. 797.

I consider these causes as removed to this court according to law, and the motion to remove them should be denied.

Motions are also made to set aside as irregular, rules entered in the common rule book on the defendant's motion requiring the plaintiffs to file and serve a copy of the declaration or be *nolle prossed*.

The causes were at issue in the state courts, and a copy of the record there had been entered in the circuit court as the statute requires; and then the statute goes on to prescribe that "the said copy being entered in the circuit court, the cause shall then proceed in the same manner as if it had been originally commenced in the circuit court." As the mode of pleading in this state is the same in the U. S. courts as in the state courts, in actions other than in equity or admiralty, by force of section 914 of the Revised Statutes, no other or different pleadings were necessary than those in the state court, and the rules entered were therefore irregular. Lewis v. Gould MSS.

Those rules must, on plaintiff's motion, be set aside.

Note.—The Circuit Courts in the 8th Circuit, Miller and Dillon, JJ., have ruled these points in the same manner.

Correspondence.

DAVENPORT, IOWA, December 27, 1875.

IOWA MECHANIC'S LIENS.

EDITORS CENTRAL LAW JOURNAL:—Your correspondent, N. M. H., of Cedar Rapids, gives you his opinion of the Iowa lien law decision. I shall begin to think comments on judicial opinions are made for a purpose; and the purpose in this case to influence the United States Circuit Court of Iowa. N. M. H. has filed several bills in the United States Circuit Court of Iowa, in which he takes the legal position advanced in his communication, that if a railroad is commenced, before a mortgage is recorded by one contractor, and another contractor, after the mortgage is recorded does work on it, under a contract made after the recording, that the latter has a lien, prior to the mortgage. N. M. H. says this is the plain meaning of the statute. He has not found any court to agree with him yet. The Supreme Court of Iowa, has in 12 Iowa, 19–21, interpreted the words referred to by N. M. H., "made subsequent to the commencement of said building, erection or improvement," to refer to commencement of work by the contractor under a contract with him, and not the beginning or completion of work by another contractor. No other meaning was ever attached to such a statute until N. M. H. found it out. Your obedient servant, JAMES GRANT,

Attorney for the other side.

[We can not, of course canvass the motives of correspondents who favor us with their views on particular questions. In what we have said and published concerning Nelson v. The Iowa Eastern Railway Company, we have had no idea of influencing pending litigation. We knew nothing of the pendency of suits in the federal court in Iowa involving this question, when we published the letter of N. M. H., and do not know that it would have restrained us from publishing it if we had known it. If a law journal should refrain from discussing a legal question because it might possibly be involved in some suit pending in some one of the numerous courts of the country, its usefulness, except as a mere case-reporter, would be at an end.—ED. C. L. J.]

EFFECT OF THE MISSOURI STATUTE REVIVING THE GENERAL ISSUE.

LAFAYETTE, IND., December 23d, 1875.

EDITORS CENTRAL LAW JOURNAL:—In your issue of the C. L. J., of date Dec. 17th, 1875, under the head of "A Nut for Missouri Lawyers," is the query as to the probable meaning of a certain enactment of the Missouri Legislature; and, as it may have escaped the observation of yourselves and some of your readers, we suggest that the act referred to is almost a literal copy of a section of the New York code, which has been in operation nearly twenty-five years, and which has been the subject of much consideration by the various courts of that State. Mr. Van Santvoord in his work on pleading, has devoted considerable space to a presentation of such cases, and Mr. Moak, in his recent edition of the work of Mr. Van Santvoord referred to, has added many recent decisions. See V. S. Pl. 3rd Ed. pp. 510, 547. We suggest that the adjudications referred to may do much toward settling the "legislative intent" of the new provision. Respectfully,

COOMBS & PARSONS.

Notes and Queries.

PAYMENT OF CHECK AFTER DECEASE OF DRAWER.

GLASGOW, KY., January 1. 1876.

EDITORS CENTRAL LAW JOURNAL:—A. loans B. $100, and gives him a check on bank for the money. The day the check was given, B. assigned it to C. Before C. presented the check for payment A. died, and his administrator notified the bank of his appointment and qualifications, and directed the fund of his intestate to be transferred to his credit as administrator. After this notice was given, the check was presented by C. for payment, and the bank paid it. Can the administrator of A. recover from the bank? B. being insolvent. Please cite authorities.

J. R.

RIGHT OF DEBTOR TO DISPOSE OF EXEMPT PROPERTY.

CHICAGO, ILL., Dec. 15, 1875.

EDITORS CENTRAL LAW JOURNAL:—A. obtains a judgment against B. for $50, has an execution levied upon certain personal property belonging to B. The constitution provides that parties may claim a certain amount of property exempt from execution, and, under this provision B. files a schedule and claims his property, including that levied upon, exempt. At the same time, or immediately thereafter, B. conveys by deed of trust his property, including that levied upon as aforesaid, to C., one of his creditors. Now it is my opinion that the intendment of the constitution was to benefit the party claiming under it, and not for the purpose of giving him an opportunity, as the above will show to defeat an existing lien in favor of one creditor, and create a lien in favor of another creditor; and I think the execution will hold prior to the mortgage as above illustrated. What do you think of the matter? It is of some importance, and I would be glad to hear from any who feel an interest. ENQUIRER.

[We do not think so. The object of the exemption law is to protect poor persons and to prevent them from becoming paupers and hence a public burden, and not to fetter the alienation of personal property. See Paxton v. Freeman, 6 J. J. Marsh. 234; Pool v. Reid, 15 Ala. 826; Cook v. Baine, 37 Ala. 350; *In re* Haake, 7 N. B. R. 71; Schiltz v. Schatz, 2 Bissell C. C. 249. But see *contra*, Smith v. Kehr, 2 Dillon C. C. 63.—ED. C. L. J.]

Book Notices.

BARTLETT'S FAMILIAR QUOTATIONS.—Familiar Quotations: Being an attempt to trace to their Sources, Passages and Phrases in Common use. By JOHN BARTLETT. ["I have gathered a posie of other men's flowers, and nothing but the thread that binds them is mine own."—Montaigne.] Seventh Edition. Boston: Little, Brown & Company. 1875.

We suppose that every editor, public speaker, or letter-writer, however original a thinker he may be, will at some time or other want to express an idea in the apt language of some of the old masters of English literature. To such persons this volume will prove a most acceptable aid, to say nothing of the pleasure to be derived from a perusal of the best thoughts of the great men who have raised and adorned our language. To illustrate the usefulness of this book to an editor, we may say that we had not had it on our table an hour, when we desired to trace the familiar adage (familiar to lawyers) of the length of the chancellor's foot. The excellent index with which this volume is supplemented enabled us readily to find it; and here it is (p. 160), in the language of old John Selden, quoted from his "Table Talk":—"Equity is a roguish thing; for law we have a measure, we know what to trust to; equity is according to the conscience of him that is chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot a chancellor's foot; what uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same in the chancellor's conscience."

The compiler of this matchless collection of gems is a member of the great publishing house whose imprint is upon the volume. Like other great publishers who might be named, he has amused his leisure with literary culture. In this he has set an example worthy of imitation. Every man, whatever his occupation, should endeavor to save time for some side pursuit, not to be followed as a business, but for recreation. In fact most men do have some object of pursuit or source of amusement outside of the business whereby they earn their bread. It may be a picture—a poem—a horse—a yacht—a dog—a gun—a velocipede, or a balloon. Whatever object it be—worthy or unworthy—it becomes one's "soul's child"—his solace—his other life. The side pursuit which Mr. Bartlett has chosen and the cultivated taste and diligence with which he has followed it, do honor both to his head and heart; and the world of authors, editors and letter-writers is to be congratulated that he has found his solace in weaving this matchless garland for their delight and edification.

WATERMAN ON TRESPASS. Two Volumes. Baker, Voorhis & Co. New York, 1875.

This work by Thos. W. Waterman, Esq. covers the subject of trespass, both in respect to the law and the remedy. The first volume related to trespass in general and trespass to personal property and trespass to the person. The second volume completes the survey, and relates to trespass on real property.

When the first volume was issued we noticed it favorably in this journal, and had intended, on the appearance of the second volume, to give the work a somewhat extended notice. But it is not nececessary. The results of our examination can be summed up in a few words. To produce a good law book the author must be a good lawyer, and have had some experience in book-making. Both of these qualifications Mr. Waterman possesses. His book is intended for practical, every day use, and aims to present the state of the law, on this old and important subject, as it is shown to exist by the judgment of the courts. The work is not characterized by original speculations or much criticism or independent suggestions as to the course of the decisions of the courts on the topics discussed, but is confined pretty closely to a statement of points decided, with an occasional illustration of the text, by giving somewhat fully in the notes, here and there, a leading judgment. The subject of trespass, by losing its name in the code states, has lost none of its importance, nor can it; and this is a useful treatise, ably and faithfully prepared. J. F. D.

ABORTION—ITS CAUSES AND TREATMENT. BY WALTER COLES, M. D., of St. Louis: 1875. For sale by Soule, Thomas & Wentworth.

Although this little monograph treats of one of the most perplexing and abstruse of all medical topics, it contains much that is interesting and instructive to the non-professional reader. The diligent enquiry and patient study which Dr. Coles has for many years devoted to diseases peculiar to the female sex, in a large field of experience, entitles any production from his pen to more than ordininary weight and authority.

To attorneys engaged in suits for malpractice or in causes growing out of the production of criminal abortion, this little work is invaluable, since it contains more information on the subject of abortion, in a condensed and connected form than can perhaps be found in any treatise in our language. All the numerous causes capable of producing abortion are not only named, but carefully classified, which is a great aid to the reader, both in a scientific, as well as practical point of view. The writer classes the causes under three heads: 1. *Parental*, originating in and transmitted from the parent; 2. *Fœtal*, originating in the child and generally manifest on a careful examination after birth; 3. *Accidental*, under which head is included all extraneous causes, such as shocks, violence, instruments used imprudently or with criminal intent, drugs, etc.

It is proper to state that this pamphlet is strictly a professional work, intended for medical men, and hence contains may technical terms which

in some instances obscure the sense with the lay reader, but are readily intelligible to any lawyer who has ever tried in court a cause involving abortion. And it will be found extremely valuable as a guide to attorneys in the examination of medical *experts* in matters connected with this important branch of our American jurisprudence. R. C.

Notes of Recent Cases.

Premium Returnable—Bankrupt Insurance Company.—Smith v. Binder; Supreme Court of Illinois. Opinion by Craig, J. [4 Ins. L. J. 809.*[The company was bankrupted by the Chicago fire, shortly after the premium had been paid to the agent. The agent had not paid the premium over to the company. *Held*, that the money not having reached the company, and the consideration having failed, the company could not maintain an action for its recovery; and that the agent, being notified by the insured that he claimed the money, was bound to return it to him.

Measure of Insured Damages—Reinsurance—Ill. Mut. F. Ins. Co. v. Andes Ins. Co.; Supreme Court of Illinois. Opinion by Sheldon, J. [4 Ins. L. J. 820.] 1. In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, but not the measure of the claim of the assured. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled when it is less than the sum insured. 2. Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that reinsured, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered of the second company. 3. And where the policy of reinsurance contained this clause: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company," in case of a loss the reinsurer will only be bound to pay at the same rate the reinsured shall pay; so that, if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay at the same rate on the amount of its policy.

Removal of cause from State to Federal Court.—Terry v. Imperial F. Ins. Co.; United States Circuit Court, District of Kansas. Opinion by Dillon, C. J. [4 Ins, L. J. 824.] The members of a corporation created within the sovereignty of Great Britain, and under the laws of that country, must be presumed to be citizens of that kingdom, and as such entitled to have their cause removed to the federal circuit court.

Agents—Investigation into Loss and Criminal Proceedings by them.—Norman v. Ins. Co. of N. Amer. *et al.*; United States Circuit Court., Southern District of Illinois. Opinion by Treat, J. [4 Ins. L. J. 827.] Agents have an implied right in case of loss to investigate the question of its incendiary character, and the exercise of such right is binding on the company. Companies are not responsible for criminal proceedings begun by their agents, unless authorized or subsequently endorsed by them.

Legislative Control of Charters, and Appointment of Custodian of Company's Assets—Contingency as to Repeal.—Lathrop *et al*, v. Ins. Commis. Steadman, U. S. C.C., Dist. of Connecticut. Opinion by Shipman, J. [4 Ins. L. J. 829]. 1. In the case of a charter subject to amendment or repeal, in a state where charters are granted by special legislation. *Held*, that one department of the government is bound to presume that another has acted rightly, and the right of the judiciary to declare a statute void will not be exercised without the clearest proof. 2. When a charter reserves the power to repeal, the legislature may exercise it summarily, and such action will not be subject to judicial review unless wantonly exercised. 3. The legislature cannot so direct the disposal of the assets as to impair the obligations of the contracts. 4. The legislature has the right to appoint a trustee to administer the affairs of a corporation whose charter is repealed. 5. The legislature has the power to state the reasons which led to the repeal, and the recitals of such reasons, like the repeal, are a legislative, not a judicial act. 6. The legislature enacted that the charter should be repealed provided an event did not occur in the future, and the occurrence of this event was to be judged by an officer and committee designated. *Held*, that this is not a delegation of the power to repeal. It is a law *in presenti* to take effect *in futuro*; that without a repeal of the charter the legislature has power to place the assets in charge of a custodian pending an investigation into its condition; and that an act empowering the custodian simply to hold the assets, and pay them back or dispose of them subject to the general statutes for the dissolution of insolvent corporations, is not unconstitutional or deserving of judicial censure.

Contract of Insurance Complete only after Issue of Policy—Insured Chargeable with Notice of Laws of Mutual Company—Inability to read No Excuse.—Fuller *et al*, v. Madison Mut. Ins. Co., Supreme Court of Wisconsin. Opinion by Ryan, C. J. [4 Ins. L. J. 841]. 1. An application when accepted does not constitute the binding contract between the parties exclusive of the policy. The application and acceptance constitute an inchoate and executory contract, executed and completed by the policy. 2. One previously insured in the same mutual company is chargeable with notice of its by-laws and business routine. 3. Inability to read a policy, through ignorance of the language, is no excuse for ignorance of its terms. 4. A proviso requiring knowledge of subsequent incumbrance, under penalty of forfeiture, is a very proper one. 5. A known breach of this condition by the insured amounts to a voluntary abandonment of his insurance. If ignorant of the condition, it was involuntary and negligent ignorance which avoided the policy.

Agent's Surety bound by Acts of Agent after Surety's Death.—Royal Ins. Co. of Liverpool v. Davis; Supreme Court of Iowa. Opinion by Miller, C. J. [4 Ins. L. J. 865]. An agent and his surety bound themselves, their heirs, executors, and administrators, jointly and severally, the condition being that the agent should promptly pay his balances during the time he officiated as agent. *Held*, that the heirs and legal representatives of the surety were bound for deficiencies in the agents accounts occurring during his agency after the death of the bondsman.

Authority of Guardian Ad Litem—Purchase of Ward's Property by Him.—Marsh *et al.* v. Marsh *et al.*; Superior Court of Cincinnati. Opinion by Yaple, J. [4 Am. L. Rec. 257.*] 1. A *guardian ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property, which may be sold in the suit or proceeding in which he acts as such *guardian ad litem*; all that he does is under the supervision and subject to the sanction or disapproval of the court. Unlike other guardians and ordinary trustees, a *guardian ad litem*, if he has fairly advised the court of the infant's rights and done all for him that the facts of the case required him to do, may purchase and hold, in his own right, the property of the infant sold under an order of court in the cause in which such *guardian ad litem* was appointed, *provided*, such purchase was in good faith and for a full valuable consideration paid by such *guardian ad litem*. 2. Where, in a proceeding by an administrator, under the act of 1831, to sell the real estate of the intestate, a *guardian ad litem* was appointed by the court, and appeared and answered for the infant defendants, there being in fact nothing to urge against the propriety of such sale, and an order of sale was granted according to law, and such lands were fairly purchased by such *guardian ad litem*, without fraud and in good faith, in his own name, for two-thirds of the appraised value, which sale was confirmed and a deed ordered to be made to him for the premises by the court, which was done. *Held*, in an action by such infant heirs, after coming of age, to have such purchaser declared their trustee of such real estate, alleging that he verbally agreed to purchase and hold the same in trust for them, that the fact of such agreement and its terms must be established with certainty and clearness, and if not so established the petition of such plaintiff, ought to be dismissed.

Common Carrier—Bill of Lading—Limitation by Carrier of Liability Beyond Its Own Route.—E. & C. R. R. Co., v. Androscoggin Mills. In the Supreme Court of the United States. Opinion by Hunt, J. [4 Am. L. Rec., 263.] Defendant was a railroad company which received certain goods for transportation to a point beyond its terminus. The bill of lading contained a provision as follows: "The E. & C. R. R. Co., will not be liable for loss or damages by fire from any cause whatever." *Held*, that the exception was not confined to the defendant's line alone but covered the entire route.

Deed—Binding Stipulation.—Stines v. Dorman; Supreme Court of Ohio. Opinion by White, J. A stipulation in a deed of conveyance whereby the grantee, in part consideration for the conveyance agrees for himself, his heirs and assigns, that the premises conveyed shall not be used or occupied as a hotel so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction..

Amendment—Statute of Limitations—Bills with a Double Aspect—Title to Real Estate decided in Equity, when Incidental to Relief Prayed for.—Wilhelm's Appeal, and Grubb's Appeal; Supreme Court of Pennsylvania. Opinion by Sharswood, J. [4 Am. L. Rec. 284.] A bill was filed in 1865, praying an account of ores taken from a tenancy in common, setting forth the title, and describing the premises held in common, by courses and distances. Seven years afterward the bill was amended by charging that ores had been taken outside the limits of what had been described as the common property in the original bill, and by putting the prayer in the alternative, asking an account co-extensive with what the court should decide from the title set forth to be the tenancy in common.. *Held*, that the statute of limitations was not a defence to the bill as amended, because the cause of action set forth therein was the same as that set forth in the original bill. *Held*, further, that where question of title is necessarily involved, it is within the jurisdiction of a court of equity to decide it.

Exemptions—Enjoining the Prosecution of an Attachment in another State.—Snook *et al.* v. Smetzer; Supreme Court of Ohio. Opinion by Rex, J. 1. Under the provisions of the code of civil procedure which relate to attachment proceedings, and proceedings in aid of execution, the earnings of a debtor for the three months next preceeding the levy of an attachment, or the issuing of an order for the examination of the debtor, are exempt from being applied to the payment of his debts, where the same are necessary to the support of his family. 2. A citizen of this state may be enjoined from prosecuting an attachment in another state, against a citizen of this state, to subject to the payment of his claim, the earnings of the debtor, which, by the laws of this state, are exempt from being applied to the payment of such claim.

*New York: C. C. Hine.

*American Law Record. Cincinnati: Block & Co.

Legal News and Notes.

—A Happy New Year to all, if it is not too late.

—The new St. Louis Court of Appeals was formally opened last Monday morning, and work began at once on the mass of business that has accumulated since the 30th of last November. The court sits, when in session, from 11 a. m. to 3 p. m., without intermission. All attorneys admitted to practice in the state courts are entitled to practice in this also upon being enrolled. We wish the court that success which the people expect and the talents of the bench promise.

—Industry and perseverance enable a man to accomplish great things. The following is an instance: The will of the late Mr. Abraham Story, solicitor, of Durham, has just been proved in the Durham Court of Probate. The deceased gentleman was of poor parentage, and he amassed by his professional labors the sum of £250,000 and upwards. He was admitted on the Rolls of the now defunct Superior Courts in Trinity Term 1829, was in active practice for forty-five years, and was for many years a member of the Solicitors' Benevolent Association.—[*The Law Times.*

—The developments of internal revenue frauds grow more startling as time advances. It is thought that the "Chicago ring" has defrauded the government nearly, if not quite, to the extent of four millions of dollars, though one-half that sum would be sufficiently stupendous to satisfy the requirements of a city anxious to be great even in its crimes. The Ciceronian orator of the St. Louis ring, now residing at Jefferson City, has promised a book on the subject, which is to tell what he knows about these matters. If he redeems his promise, it should leave very little other information to be desired.

—The British Admiralty have issued a second fugitive slave circular, which has met with the disfavor accorded the first. The Anti-Slavery Society and the Birmingham Liberal Association, have protested against it. The latter stigmatize the circular as opposed to human freedom and English feeling, and as disgraceful to the nation. The *Times* and the *Post* both condemn it, because it surrenders the principle of the freedom of a British man-of-war from foreign jurisdiction, and on other grounds. We doubt not that it is as consistent to international law as was the former, and we can but regret the difference between the law and the sentiment of the British people.

—Hon. John R. Flippin, judge of the Criminal Court of Shelby County (Memphis), Tennessee, retired from the bench on the first of January, by resignation. He has proved an able, honest, hard-working, and, in all respects, a most acceptable judge. From the 18th day of July, 1870, the day he took his seat as judge, up to the 10th of the last month, the following cases appear on the clerk's books, in which the accused were convicted: Buggery, 1; bigamy, 2; perjury, 3; arson, 4; bringing stolen property into the State, 6; illegal cohabiting, 8; fraudulent breach of trust, 10; forgery, 11; rape, 12; malicious shooting, 13; receiving stolen goods, 16; false pretences, 24; robbery, 35; malicious cutting and stabbing, 42; assault with intent to kill, 47; horse stealing, 60; homicide (murder of all grades), 64; burglary (including house breaking), 110; larceny, 877. Total, 1345. In addition to these, a vast amount of labor has been performed in trying misdemeanor cases, and cases in which the defendants were acquitted. Judge Flippin has been nominated for Mayor of Memphis by the Democratic party of that city, with which a great many affiliate who were formerly republicans, and he will undoubtedly be elected. It is but a just compliment to say that there is no gift within the hands of the people of Memphis that they would not willingly bestow upon him. Honored and trusted, and deserving of honor and trust—it is a matter of congratulation that his loss to the bench will not be a loss to the public, for he will step into an important administrative office where the qualities which he has displayed so conspicuously in his former position will be of equal service to his fellow citizens.

—Liability of Married Women to maintain their Husbands.—At the Caurse Petty Sessions, Welshpool, on Monday, Nov. 1. before J. Robinson Jones, Esq., William Fisher, Esq., Captain Mytton, and E. S. R. Trevor, Esq., Mr. Wilding, on behalf of the Guardians of the Forden Union, applied for an order of maintenance on Arthur Jones (son), Susannah Jones (wife), and the daughter of one Richard Jones, a pauper inmate of the workhouse. He stated that as regarded the wife, the application was grounded upon the provisions of the "Married Woman's Property Act," which rendered the wages of a married woman living apart from her husband her separate property, at the same time that it rendered her liable to contribute towards his maintenance, if a pauper, as was here the case. The wife did not appear, but proof was given of the service of the summons upon her. Witnesses were called who proved that the son was a porter, and the wife cook at Bicton Lunatic Asylum. It was also proved that both were in receipt of wages sufficient to enable them to contribute to the maintenance of the pauper. It was also stated that the cost per week of an in-door pauper was 3s. 8d., and the magistrates, after some deliberation, particularly with reference to the provisions of the Act before mentioned, made an order upon the son to contribute 2s. 6d., and upon the wife for the remaining 1s. 2d. per week. The case as against the daughter was withdrawn, as it appeared that she was out of service. We believe this to be the first instance in this neighborhood of a married woman's being called upon to contribute to the maintenance of her husband.—[*Oswestry Advertiser.*

—A Correspondent has sent us a postal card sent out by Solon W. Paul, manager of the "American Attorney's Collection Association," of Saint Louis, in which he (our correspondent) points out several grammatical errors, and expresses the hope that the legal directory men may be ventilated. Our correspondent states that not long since he received a proposition from one of them to give him five or ten dollars (our correspondent does not say which) and have his name inserted in his list of strictly honorable attorneys, and that he found in this list the name of an attorney of his county who notoriously pockets every collection he makes, and against whom a motion had been filed to exclude him from the profession. We know nothing about the gentleman who has sent out the postal card in question. We notice, however, on the card sent to us the names of several honorable attorneys represented as being his agents, and several letters have recently come from correspondents with his lists printed on the back of them. It is quite likely that swindles may be attempted under the blind of establishing "collection agencies." When anything of this kind occurs and is well authenticated, we shall be glad to assist in ventilating it, as our correspondent suggests. But we express no opinion as to the enterprize of Mr. Paul, for we know nothing whatever about it.

—The *New York Herald* has been giving good advice to the new judges in that city. It seems that the bench has too often of late been identified with political meetings and party workings. The *Herald* says that three of the vice-presidents at a recent Tammany meeting were judges of the superior or supreme court. The caution given by the newspaper is timely, but rather humiliating. We have not forgotten the conduct of the New York bench during the palmy days of Tweed's administration. That the evil practices of these courts was not generally imitated elsewhere, most probably has been due to want of opportunity and inducement. It is one of the disadvantages of our elective system, that the judiciary must more or less be confused with party politics; but no excuse can be offered for any judge who continues this connection after his election has been secured. In a country like ours it is the privilege of every voter to be eligible to any office in the gift of the people, but the legal fraternity should be sufficiently impressed with the necessity of impartiality in administering justice, to be willing to forego the pursuit of all other honors while holding a judicial position. De Tocqueville well said that the stability of our government was due to its laws, and that the lawyers were the best conservators of our institutions, in fact, our only aristocracy. It is surprising that judges do not adequately estimate the power and importance of their positions. Even if they do not keep aloof from politics because of pride in their profession, they should do so because of fidelity to duty. The letter of Chief Justice Waite, in which he disclaimed all desire of the presidency, and modestly declared that it was work enough to preserve his office in its pristine purity and vigor, was very gratifying, in view of the feelings and expressions of former incumbents, but should have been uncalled for and unnecessary. The proper administering of the law is full of good and usefulness, and he who would benefit his country could find no fairer field in which to work; and those who seek for fame should know that, to stand at the head of the judiciary is not less honorable or commendable than to be in the front rank of the legislature, or even to be the executive himself, while it is far more dignified, and can be made productive of even greater good.

—We give below the form of marriage which bound two telegraph operators. As will be seen, the officiating clergyman was at Waynesburg, while the high contracting parties were at Brownsville. There were numerous witnesses at each place. If marriage is a commercial contract, we see no reason why this may not be as binding as many others. If any lawyer thinks this illegal, let us hear from him:—

[Brownsville to Waynesburg.]

Tell Rev. Mr. Scott we are ready now.

[Waynesburg to Brownsville.]

To G. Scott Jeffreys and Lida Culler, Brownsville, Pa.

Marriage is an ordinance of God, for the welfare and happiness of the human family, instituted at the creation and union of the first pair, by which He ordained the union of one man with one woman in bonds of pure and holy wedlock for life. The parties to be united at this time please to join hands.

[Signed] J. W. Scott,
Minister of the Gospel.

[Brownsville to Waynesburg.]

It is done.

[Waynesburg to Brownsville.]

Do you, George Scott Jeffreys and Lida Culler, who hold each other by the hand, take each other as lawful and wedded companions for life; and do you solemnly promise, before God and the witnesses present, that you will live together, and be to each other faithful, loving, and true, as husband and wife, till God shall separate you by death?

[Signed] J. W. Scott,
Minister of the Gospel.

[Brownsville to Waynesburg.]

"We do."

[Signed] George Scott Jeffreys.

"We do."

[Signed] Lida Culler.

[Waynesburg to Brownsville.]

In the name and by the authority of God, I pronounce you husband and wife. Whom God hath joined together, let no man put asunder. And may God the Father, Son and Holy Ghost bless the union and yourselves individually and personally, now and forever. Amen.

[Signed] J. W. Scott,
Minister of the Gospel.

[Brownsville to Waynesburg.]

"Thank you." Jeffreys.